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INSTITUTE OF INSOLVENCY PROFESSIONALS
A wholly owned subsidiary of ICSI and registered with IBBI
(Formerly known as ICSI Insolvency Professionals Agency)
'ICSI House', 3rd Floor, 22, Institutional Area,
Lodhi Road, New Delhi - 110 003

NEWS FROM THE INSTITUTE

◆ Workshop on 'Pre Pack Paradigm in India'

On 24th April, 2021, ICSI IIP organized a full day workshop on 'Pre Pack Paradigm in India'. It was attended by 100 professional members. The workshop was addressed by the eminent speakers namely, Mr. Ashish Makhija, Insolvency Professional and Advocate Sumant Batra, Senior IBBI Officials opened the workshop with their comments on the subject.

◆ Workshop on 'Role of professionals & committee of creditors during CIRP & Liquidation'

On 17th April, 2021, ICSI IIP organized a full day workshop on 'Role of professionals & committee of creditors during CIRP & Liquidation'. It was attended by 100 professional members. The workshop was addressed by the eminent speakers namely, Mr. K. R. Saji

Kumar, Joint Secretary and Legislative Counsel Government of India Mr. Amit Gupta, Insolvency Professional and Dr. K. S. Ravichandran

◆ IBC Executive Certificate Course jointly with ICSI

On 21st April, 2021, IBC Executive Certificate Course was launched jointly with ICSI. It will be a course spanning over 4 months with once a week class from imminent IBC experts.

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At a Glance

No. 4 | Pg. 1-100 | APRIL 2021

Section 5 of the Limitation Act, 1963, read with articles 141 and 142 of the Constitution of India - Extension of prescribed period in certain cases - Supreme Court in its order dated 23-3-2020 in Cognizance for Extension of Limitation, In re (2020) 117 taxmann.com 66, ordered extension of period of limitation in filing petitions/suits/applications/appeals/all other proceedings on account of COVID-19 - Thereafter, on 8-3-2021 it was noticed that country was returning to normalcy and since all Courts and Tribunals had started functioning either physically or by virtual mode, extension of limitation was regulated and brought to an end - Whether in view of

extraordinary situation caused by sudden and second outburst of COVID-19 virus, Supreme Court restored order dated 23-3-2020 and directed that period(s) of limitation, as prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings, whether condonable or not, shall stand extended till further orders - Held, yes (Para 6)

- **Ghanashyam Mishra & Sons (P.) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd.**
  (2021) 126 taxmann.com 132 (SC) • P-120

Section 31, read with section 238, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Whether amendment to section 31 by IBC (Amendment) Act 2019 is, declaratory clarificatory in nature and therefore, will be effective from date on which I & B Code has come into effect - Held, yes - Whether once a resolution plan is duly approved by Adjudicating Authority under sub-section (1) of section 31, claims as provided in resolution plan shall stand frozen and will be binding on corporate debtor and its employees, members, creditors, including Central Government, any State Government or any local authority, guarantors and other stakeholders - Held, yes - Whether, therefore, all dues including statutory dues owed to Central Government, any State Government or any local authority, if not part of resolution plan, shall stand extinguished and no proceedings in respect of such dues for period prior to date on which Adjudicating Authority grants its approval under section 31 could be continued - Held, yes (Paras 87, 94 and 95)

Section 5(20), read with sections 3(10) and 5(21), of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Operational creditor - Whether even a claim in respect of dues arising under any law for time being in force and payable to Central Government, any State Government or any local authority would come within ambit of `operational debt' - Held, yes - Whether thus, Central Government, any State Government or any local authority to whom an operational debt is owed would come within ambit of `operational creditor' as defined under sub-section (20) of section 5 - Held, yes (Para 91)

- **Sandeep Khaitan v. JSVM Plywood Industries Ltd.**
  (2021) 127 taxmann.com 38 (SC) • P-128

Section 14, read with sections 17 and 19 of the Insolvency and Bankruptcy Code, 2016 and section 482 of the Code of Criminal Procedure, 1973 - Corporate insolvency resolution process - Moratorium - NCLT admitted an application under section 7 against corporate debtor - Appellant was appointed as Interim Resolution Professional (IRP) and was subsequently confirmed as RP and a moratorium was declared - Appellant alleged that former directors of corporate debtor in conspiracy with Respondent No. 1 company transferred Rs. 32.50 lakhs from corporate debtor's bank account without appellant's sanction in violation of section 14 - Appellant-RP filed an FIR which was challenged by respondent No. 1 in a petition under section 482 of Code of Criminal Procedure before High Court - Respondent No. 1 also filed an application for allowing it to use its bank account over which lien had been created and accounts of its creditors frozen in connection with FIR - High Court by order allowed respondent No. 1's application - Appellant on appeal submitted that High Court had overlooked limits of its power in passing impugned order- Whether power under section 482 may not be available to Court to countenance breach of a statuary provision - Held, yes - Whether words `to secure ends of justice' in section 482 of Code of Criminal Procedure cannot mean to overlook undermining of a statutory dictate, viz, provisions of section 14 and section 17 of IBC - Held, yes - Whether with appointment of IRP, powers of Board of Directors of corporate debtor get suspended and such powers are to be exercised by IRP as provided in section 17 of IBC - Whether in view of this position, transaction of Rs. 32.50 lakhs without appellant's consent was not in accordance with law - Held, yes - Whether therefore, High Court's order allowing respondent No. 1 to operate

account without first remitting Rs. 32.50 lakhs into account of corporate debtor was violative of the moratorium in section 14 of IBC - Held, yes - Whether therefore High Court's order was to be modified to effect that respondent would be allowed to operate its account subject to payment of Rs. 32.50 lakhs into corporate debtors account - Held, yes (Paras 24 and 25)

Words and Expressions : `Expression' to secure ends of justice as appearing in section 482 of code of Criminal Procedure, 1973

- **Ruchi Soya Industries Ltd. v. Union of India**
  (2021) 127 taxmann.com 160 (Madras) • P-133

Section 31 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Whether in view of decision of SC in Ghanashyam Mishra & sons (P.) Ltd. *v.* Edelweiss Assest Reconstruction (P.) Ltd. (2021) 126 taxmann.com 132 if `Customs duty' payable to respondent, customs department under subject Bill of Entry was not factored by corporate applicant in corporate resolution plan submitted before National Company Law Board, same would stood extinguished - Held, yes (Para 75)

- **Ministry of Corporate Affairs v. Amit Chandrakant Shah**
  (2021) 127 taxmann.com 165 (NCLAT- New Delhi) • P-134

Section 66 of the Insolvency and Bankruptcy Code, 2016 read with section 213 of the Companies Act, 2013 - Corporate person's Adjudicating Authorities - Fraudulent or wrongful trading - Whether NCLT, on receipt of complaint of alleged violation, is not competent to directly ask Central Government to refer matter to `Serious Fraud Investigation Office' for further investigation as there is a procedure required to be followed under section 213 (*b*) of Companies Act - Held, yes (Paras 11 and 12)

- **Union of India v. Vijay Kumar V. Iyer**
  (2021) 126 taxmann.com 147 (NCLAT- New Delhi) • P-135

Section 53, read with section 18 of the Insolvency and Bankruptcy Code, 2016 and section 4 of the Indian Telegraph Act, 1885 - Corporate liquidation process - Asset, distribution of - Whether telecom spectrum is a natural resource and Government is holding same as cestui que trust and same would not be available to use without payment of requisite dues - Held, yes - Whether spectrum, being intangible asset of Licensee/TSPs/Telcos/corporate debtor, can be subjected to insolvency/liquidation proceedings - Held, yes - Whether dues of Central Government/DOT under Licence fall within ambit of operational dues under I&B Code - Held, yes - Whether deferred/default payment instalments of spectrum acquisition cost also fall within ambit of operational dues under I&B Code - Held, yes - Whether triggering of corporate insolvency resolution proceedings under I&B Code by corporate debtor with object of wiping off of such dues, not being for insolvency resolution, but with malicious or fraudulent intention, would be impermissible - Held, yes - Whether under section 18, Interim Resolution Professional is bound to monitor assets of corporate debtor and manage its operations, take control and custody of assets over which corporate debtor has ownership rights including intangible assets, which includes right to use spectrum - Held, yes - Whether spectrum cannot be utilized without payment of requisite dues which cannot be wiped off by triggering CIRP under I&B Code - Held, yes - Whether defaulting Licensees/Telcos cannot be permitted to wriggle out of their liabilities by resorting to triggering of CIRP by seeking initiation of CIRP under section 10, not for purposes of resolution but fraudulently and with malicious intent of withholding huge arrears payable to Government, obtaining moratorium to abort Government's move to suspend, revoke or terminate Licences and in event of a resolution plan being approved, subjecting Central Government to be with offered to it as `operational creditor' within ambit of distribution mechanism contemplated under section 53 - Held, yes (Para 75)

- **Ms. AKJ Fincap Ltd. v. Bank of India**
  (2021) 127 taxmann.com 875 (NCLAT- New Delhi) • P-159

Section 60, read with section 7, of the Insolvency and Bankruptcy Code, 2016 and rule 49 of the National Company Law Tribunal Rules, 2016 - Corporate person's Adjudicating Authorities - Adjudicating Authority - Whether Adjudicating Authority has power to *set aside* an *ex-parte* order, provided it is satisfied that there was sufficient cause with respect to service of notice as provided in rule 49(2) - Held, yes (Para 11)

- **Directorate of Enforcement v. Manoj Kumar Agarwal**
  (2021) 126 taxmann.com 210 (NCLAT- New Delhi) • P-160

Section 14, read with section 238, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Moratorium - Whether after attachment when matter goes before Adjudicating Authority under PMLA, proceeding before Adjudicating Authority for confirmation would be civil in nature, that being so, section 14 would be attracted and applies - Held, yes - Whether section 14 will hit institution and continuation of proceedings before Adjudicating Authority under PMLA - Held, yes - Whether even if Authority under PMLA issues order of provisional attachment, institution and continuation of proceedings before Adjudicating Authority for confirmation would be hit by section 14 - Held, yes - Whether if Authorities under PMLA on basis of attachment or seizure done or possession taken under said Act resist handing over properties of corporate debtor to IRP/RP/Liquidator consequence of which will be hindrance for them to keep corporate debtor a going concern till resolution takes place or liquidation proceedings are completed, obstructions will have to be removed - Held, yes - Whether there is no conflict between PMLA and IBC and even if a property has been attached in PMLA which is belonging to corporate debtor, if CIRP is initiated, property should become available to fulfil objects of IBC till a resolution takes place or sale of liquidation asset occurs in terms of section 32A - Held, yes (Paras 39, 40, 41 and 42)

- **Mazda Agencies (Partnership Firm) v. Hemant Plastics & Chemicals Ltd.**
  (2021) 127 taxmann.com 877 (NCLAT- New Delhi) • P-162

Section 238A, read with section 9, of the Insolvency and Bankruptcy Code, 2016 and section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) - Corporate insolvency resolution process - Limitation period - Appellant operational creditor supplied printing and packaging material to respondent corporate debtor - Corporate debtor had acknowledged outstanding dues, however, failed to make payment - Due to financial crunch, corporate debtor was referred to BIFR, however formulation of approved scheme of rehabilitation did not work out - Subsequently, Sick Industrial Companies (Special Provision) Act, 1985 (SICA) was repealed on 1-12-2016 - Thereafter, operational creditor filed an application under section 9 of IBC - Adjudicating Authority held that application under section 9 of IBC was barred by Limitation - Appellant submitted that reference under SICA was made in 2005 and rehabilitation scheme had been sanctioned by erstwhile BIFR on 17-7-2013 but scheme could not be implemented till 2017; therefore, till 2017 remedy for enforcement of right to recovery was suspended under section 22(1) of SICA, hence, as per provision of section 22(5) of SICA, it would be entitled to get exclusion for aforesaid period in computing period of limitation - However, it was found that after formulation of a rehabilitation scheme under erstwhile SICA, appellant had sought permission from BIFR to approach Civil Court for adjudication of its dues - Thus, he was not part of scheme - Whether therefore, it could not be said that legal right of remedy of appellant against respondent was suspended as per section 22(1) of SICA - Whether thus, appellant would not be entitled to claim exclusion of time spent by it in SICA proceedings while computing limitation period - Held, yes (Paras 20, 22 and 24)

- **Pradeep Kumar Sekar v. Solar Semi-conductor Energy Systems (India) (P.) Ltd.**
(2021) 127 taxmann.com 871 (NCLAT - Chennai) • P-164

Section 5(8), read with sections 3(12) and 7, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Financial debt - Corporate debtor had entered into a Lease Agreement with financial creditor for availing Lease Finance Assistance in respect of furniture and fixtures for its business purposes - On default being committed by corporate debtor, financial creditor issued demand notice and later filed application under section 7 which was admitted by Adjudicating Authority - Appellant, suspended director of corporate debtor, submitted that disbursal of amounts to corporate debtor was against supply of assets and against usage of assets (furniture & fixture) and not against time value for money and that primary ingredients of section 5(8) were not satisfied - However, it was found that 'Time Value' is price associated with length of time that an investor must wait until investment matures or related income is earned - In instant case financial creditor had invested a sum under 'Lease Agreement', in and by which a repayment schedule was mentioned as lease rental for a period of 36 months and at end of lease, asset was to be purchased by corporate debtor at a value which was received by financial creditor as security deposit - Whether therefore, it was an inevitable conclusion that disbursal of amounts to corporate debtor came within requirement of time value for money - Held, yes - Whether therefore, lease in instant case was a financial lease and there was financial debt as per section 5(8) and default being committed by corporate debtor in terms of ingredients of section 3(12), Adjudicating Authority had rightly admitted application under section 7 filed by financial creditor - Held, yes (Paras 53 and 58)

- **Renganayaki Agencies v. Sreenivasa Rao Ravinuthala**
(2021) 127 taxmann.com 867 (NCLAT - Chennai) • P-166

Section 31, read with section 30, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Resolution Professional compared Resolution Plans submitted by both K Group and CS - Resolution Plan submitted by both resolution applicants was almost equally placed except that K Group had scored in terms of faster payment of amount for resolving corporate debtor - Thus, though resolution plan of 'K Group' had been approved with 100 per cent voting in favour of it by CoC, Adjudicating Authority by impugned order held that in view of very meagre difference between both Resolution Plans there was scope for further improvement of resolution amount to be payable by resolution applicants - Accordingly, it directed CoC to take fresh bids from existing two resolution applicants and submit a fresh resolution plan for consideration - However, decision taken by CoC is a decision taken in accordance with its 'commercial wisdom', and hence, could not have been interfered with - Whether therefore, impugned order was to be set aside and Adjudicating Authority was to approve 'Resolution Plan' approved by CoC with 100 per cent voting in favour of 'K Group' - Held, yes (Para 19)

- **Sunil Kewalramani v. Kestrel Import & Export (P.) Ltd.**
(2021) 127 taxmann.com 869 (NCLAT- New Delhi) • P-167

Section 5(8), read with section 7, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Financial debt - Corporate debtor was a family owned company - Appellant was promoter, director and shareholder of company - Appellant had advanced loan on various dates to corporate

debtor, out of which an amount was due to appellant by corporate debtor which corporate debtor had failed to pay - Hence, appellant filed petition under section 7, seeking to initiate Corporate Insolvency Resolution Process (CIRP) against corporate debtor - Corporate Debtor, however, submitted that contribution, made by appellant, was in form of share capital like other Directors and shareholders and amount was invested as quasi capital in company and there was no debt which was due and payable in terms of section 5(8) and, therefore, there was no default - Accordingly, adjudicating authority dismissed petition holding that proceedings had been initiated by appellant fraudulently and falsely and not for resolution of Insolvency - However, there was nothing on record to show that proceedings under section 7 were initiated for purpose other than seeking a resolution and appellants had initiated proceedings under section 7 in their capacity as financial creditors - Petition had been dismissed mainly because alleged debt could not be treated as financial debt - Furthermore, there was nothing on record to show that proceedings under section 7 initiated by appellant contained false particulars - Whether therefore, Adjudicating Authority could not have rejected application making invalid observations that appellant initiated proceedings fraudulently and falsely, not for resolution of insolvency - Held, yes - Whether therefore, appeal was to be allowed and remarks/observation made by Adjudicating Authority in impugned order were to be expunged - Held, yes (Paras 24 to 30)

P.K. MALHOTRA

ILS (RETD.) AND FORMER LAW SECRETARY (MINISTRY OF LAW & JUSTICE, GOVT. OF INDIA)

From Chairman's Desk

The month of April saw a seminal development coming through in the insolvency and bankruptcy law regime in India. The introduction of a new Chapter (Chapter III-A) in the IBC (and other provisions) which lays down rules regarding the newly introduced Pre-packaged Insolvency Resolution Process for the MSMEs seeks to address the issue of financial distress in this particular sector (MSMEs). According to the Experts, since many MSMEs got seriously impacted by the pandemic, this amendment, which has come in less than two weeks after the IBC suspension got lifted, it is definitely going to help in resolving the situation. As you all know that the decision to suspend certain IBC provisions was taken due to the economic disruption caused by the pandemic. However, as the maximum period possible *vis-a-vis* the suspension period (*i.e.* 1 year) was getting close, it was everybody's guess as to what further steps can be taken in order to prevent liquidation of CDs who were maintaining sound financial health, but for the pandemic impact.

Under the pre-packaged process, the creditors and the CD shall be able to work out a feasible resolution plan which shall ultimately require NCLT approval. Though the Ordinance provides for a debtor-in-possession (DiP) methodology, there are several checks and balances in the process to ensure that the process is not put to any misuse. This includes the incorporation of a plan evaluation method which is akin to

Swiss Challenge method. This shall ensure that there is least impairment of rights and claims of creditors. Further, the process has been made subject to section 29A limitations and shall require consent of 66 per cent of financial creditors before a resolution plan can be approved. The CoC has further been empowered to convert the PPIRP into a CIRP process by a 2/3rd voting share. The CoC can also require the RP to take over control of the CD from its management if it is found that some fraudulent act (or mismanagement) was being carried out by CD's management.

This new process shall offer the promoters with an alternative to the usually expensive and relatively drawn-out CIRP where in chances of productive assets getting liquidated are relatively high. The Ordinance should help the MSMEs in getting their stressed assets restructured quickly and since this mechanism allows CD's management to be a part of the restructuring exercise, it provides them with another opportunity to do a course-correction and to be allowed to continue running the business operation shall definitely be a huge incentive for them to act on time and in good faith. The way in which this process has been crafted, it leave no doubt that there is not much likelihood of misuse of this process of law, and if it is discovered that the affairs of CD are carried out fraudulently or there is any mismanagement, the CoC is empowered to require the resolution professional to apply to NCLT for shifting of CD's control and management to the resolution professional itself. The entire set of subordinate legislation (rules and regulations) have been laid down and are being put in place. What remains to be seen is how productively the MSME sector makes use of this facility!

The other major legal development in the IBC law space has come from Hon'ble Supreme Court wherein it has cleared the air around the issue as to whether, after approval of a resolution plan (in respect of a CD) by the NCLT, can there be a subsequent filing of claim or otherwise initiation of recovery proceedings by a creditor on the ground that his claim did not form part of the resolution plan. While interpreting the language of s. 31, the Court held that the legislative intent of the provision is that the resolution applicant should start with a fresh slate, and thus, once a resolution plan is approved by the NCLT, it is binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders. Referring to 16th

September 2019 amendment, the SC held that the resolution plan shall be binding on the government authorities as well. In a nutshell the position of law as made clear through this landmark judgment is, (*a*) Upon approval of a resolution plan by the NCLT (s. 31(1)), the claims provided in the resolution plan stand frozen and shall be binding on all stakeholders, including the CD, its employees, its members, creditors, the Central Government, the State Government(*s*) and any local authority; (*b*) Once the resolution plan is approved by the NCLT, all claims which do not form part of the resolution plan shall stand extinguished, and no person shall be entitled to initiate or even continue any subsequent proceedings *vis-à-vis* such claim(*s*); (*c*) the 2019 Amendment made to the IBC (*supra*), being declaratory and clarificatory in nature, has retrospective effect.

I wish to see you all very soon!

Take care.

DR. BINOY J. KATTADIYIL
MANAGING DIRECTOR
ICSI INSTITUTE OF INSOLVENCY PROFESSIONALS

Managing Director's Message

Integrity is not a bunch of values or ethics; it is the coherence between how you are, how you think and how you act.

Dear Professional Members,

At a time when all eyes are locked-on to check as to what shall be the next course of action that a progressive economic legislation like the IBC shall undertake in order to deal with the economic stress that has resulted from the current pandemic and which has impacted the MSME sector the most, the Union Government has promulgated an Ordinance introducing the much awaited pre-packaged insolvency resolution process scheme under the IBC. The Ordinance comes *on the heels of* end of suspension period and offers an alternative resolution mechanism to the MSMEs which is quicker, cost-effective and value maximising for the stakeholders, and lays down a manner which is least disruptive to the continuity of their businesses. In short, the PPIRP allows the promoters and CD's management to work out an informal plan for debt resolution with the creditors which shall become binding on the parties once approved

by NCLT. The PPIRP has been hailed by the Experts for not just its rationale and timings, but also the sensitivity shown by the Government towards the pain suffered by the MSME sector in India. Under the Ordinance, when an MSME defaults, it can now propose a base resolution plan and with the consent of 66 per cent of unrelated financial creditors initiate pre-packaged insolvency resolution process. Once the process is initiated, the NCLT shall appoint a Resolution Professional, who shall act as a facilitator of the process, and shall, if required, help improve the base resolution plan or invite a competitive plan from potential resolution applicants. The most interesting and distinguishing feature of this process (as compared with the CIRP) is that CD's management retains control of the operation, however, if it is discovered that CD's affairs were carried out fraudulently or that there was otherwise gross mismanaged, then the CoC (through the resolution professional) can apply to the NCLT for shifting CD's control and management to the RP itself. Therefore, while incentives have been created for those who carry out their responsibilities with fairness, such a privilege is liable to be taken away in case an element of wilful misconduct is discovered. I wish and I am sure that cases of honest failures shall get adequate protection by virtue of this new scheme.

I visualize the life journey of IBC as having somewhat similar features as that of a human being. It is a journey which has got influenced and also defined by the difficult circumstances that it went through. I other words the life journey of IBC is a process in the making(an ever-evolving process). The challenges thrown in its way have been far too many. Initially, it was challenged by those who had a vested interest in the continuation of the preceding legal regime (SICA law etc.),however, what truly protected it's existence is its own strength and solemn objective to establish a legal regime that facilitates time-bound resolution of insolvency and also optimum use of scare resources.. One of the other most important and long-term objective which IBC seeks to achieve and which I wish to elaborate here is "*promoting entrepreneurship*". The term *entrepreneurship* has been defined differently by different people, and it all depends on the set of factors that one wishes to take into account. One of the most common definition of the term is that it is an act of creating a business/es while building and scaling it to generate a profit. The other most accepted definition is about transforming the world by solving big problems and thereby bringing in a social

change through creation of innovative products that challenge the *status quo* of how we live our lives on a daily basis.

While all the aforementioned aspects of the definition of the term are important, what we must keep in mind is that a *leader* is the one is capable of seeing things in a manner which others are not able to see or analyse. This is essentially because he is placed in a position wherein he is naturally able to see, analyse and visualie the things in a better way, and is therefore capable of deciding what is in the best interest of the organization/group that he leads and can do exactly what is needed to be done. For this, one must be able to pay attention to details, he/she must have very high levels of integrity and must be able to inspire others to bring out the best through their actions. A leader can inspire others by being absolutely committed to what they are doing. The prime business of every leader is also to ensure human well-being. Humanity introduced and created big businesses only to ensure well-being of the society and not to create a hierarchy so that those sitting at the bottom can be exploited. A business may be engaged in producing a computer, or a furniture, or a car, or even an aircraft, but the ultimate aim of all such activities is to ensure human well-being. In other words, a leader should be able to lead by example, and demonstrate it through his conduct. Fundamentally, leading people means that you have the ability to decide the right course of action and take people with you in order to achieve the goals of the group. Needless to mention that when you are able to inspire others to do what you want them to do that you will truly succeed in achieving more than what you yourself thought of achieving because there is always a bonus attached with good work. Leadership becomes an effortless exercise only when you are able to inspire others to do what is required out of them.

I thank all our members for their very active support and participation in all the learning activities organised by ICSI IIP. As an IPA we are committed to serve our members with the best of our services.

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INTERVIEW

ANISH NANAVATY

INSOVELNCY PROFESSIONALS

1. At the outset, let me start by asking your views about your overall experience as an Insolvency professional in terms of assignments handled, fees received, obstacles faced while handling processes, scope of Insolvency and Bankruptcy Code.

The experience has been a combination of very challenging and full of learning. Challenging in a way that as RP, one is required to put into practice into real life situations - a Code based on what-is and at many a time, without precedent. The pandemic has thrown up its own share of situations which need to be dealt with.

The flip side of the challenges is the learning that accrues when dealing with issues, and let me say, everyday is a learning experience - be it operational issues, compliance, cashflow and finance, labour and personnel issues, etc.That said, dealing with legal issues with such granularity is something completely new and has occupied a lot of attention.

A particularly sensitive area has been in eliciting co-operation without rancour from promoters and employees of the Corporate Debtor, i.e., from those very stakeholders who would view the Resolution Professional from an adversarial standpoint.

2. How practicing as an Insolvency professional has impacted your consultancy practice? How are you managing both the professions?How different is Insolvency profession from other professions?

My transition has been from a full-time employee and banker to being an independent professional. The transition, while not easy, has provided me an opportunity to leverage my experience and at the same time, further extend it to newer domains.

The difference has been in the feedback mechanism and reporting. As an employee reporting is the superiors, the management or the Board of Directors and feedback is with a lag. As a Resolution Professional, reporting is to a regulator, the CoC and other key stakeholders, and often feedback is in real-time.

That said, the need and importance of discipline in both situations can hardly be over-emphasised.

3. How are you managing your ongoing assignments of CIRPs during this COVID outbreak?

For one of the assignments, with Corporate Debtor operating an essential service, was required to operate from day-one, even under complete lockdown - which meant adjusting to a managing with limited personnel in company premises and WFH, putting in place necessary SOPs and due precautions and obtaining valid permits for employees and clients, where applicable. Inspite of this you have employees contracting COVID and who need support.

CoCs, Board meetings and Annual General Meetings (AGMs) are being held online almost exclusively. An upshot of the pandemic has been cost savings on account of dispensing with printing of annual financial statements and holding AGMs in auditoria.

Travel restrictions have meant site visits and company meetings are a combination of virtual and in-person.

4. How was your experience on working with the Bankers? How they perceive the Indian Insolvency regime?

To take your second question first, Bankers have been overall positive on the IBC regime, including time-bound nature of resolution, its utility in incentivising pre-IBC settlements, and that the resolutions have the judicial imprimatur for diverse creditors to achieve resolution under a common IBC umbrella.

However, there are concerns on the per centage of CIRP ending in liquidation and the time taken to achieve resolution.

I have found Bankers to be result-oriented and very professional in their dealings as part of the CIR Process.

5. What are your views on framework of Pre-packaged Insolvency Resolution Process and Individual Insolvency? How it will impact the overall functionality of Insolvency and Bankruptcy Code?

The hope and expectation is that the pre-packaged IRP route would, in line

with the international experience, lead to acceleration in resolution, reducing the burden on the adjudicating authority.

6. How far your expectations from the Judiciary and regulators in the insolvency sphere have met? Do you have any suggestions for the Government, judiciary and regulators to strengthen Insolvency and Bankruptcy regime?

IBC has certainly increased the ease-of-doing business and taken India towards parity with the developed economies in insolvency resolution regimes, and is certainly an improvement over the past regimes such as the BIFR. The experience of the past 4 years and support from key stakeholders has helped to entrench the IBC Code within commercial law. The Prepack IRP should help to further reduce time and cost of insolvency resolution.

Given the case load, increasing the number of benches of the adjudicating authority and that of the appellate authority will certainly in reducing the case-burden and strengthening the IBC regime, and extending the Prepack IEP regime to all corporates, albeit with safeguards, should further strengthen the Insolvency and Bankruptcy regime.

7. What is your take on the recent Supreme Court Judgment on personal guarantors?

This judgment has imparted a much-needed finality on a very contentious issue.

8. Any advice to the prospective aspirants or Fresh Insolvency Professionals who are seeing their career in Insolvency Law?

Speaking from personal experience, this is a profession which demands 24x7 involvement. The Resolution Professional would at different times be required to wear various hats - a manager, CEO, HRD Incharge, CFO while at all times as an officer of the Court upholding the law but who also is willing to innovate/ experiment within the confines of the law. The Resolution Professional has to bear in mind that (s)he is a trustee of the assets and cashflows of the Corporate Debtor, which need be maintained for handover to a qualified investor at the earliest.

9. Lastly, how significantly do you think the ICSI Institute of Insolvency Professionals (ICSI IIP) serves the profession of Insolvency Professionals?

An area which ICSI IIP and other IPAs can help to address is the issue of RP Insurance. ICSI IIP can help in bringing together insurance providers so as to develop cost-effective insurance products. Another area where IPAs are already contributing but further work can be done, is to develop and update course material based on case studies and case law for aspiring resolution professionals.

Insight!

Understanding: Significance and Provisions of Bilateral Netting of Qualified Financial Contracts Act, 2020 (a breather for insolvent companies)

MS. REKHA SHAH

(Chartered Accountant and Insolvency Professional)

Preamble

Financial institutions and other financial intermediaries employ a number of risk mitigating mechanisms to reduce their risk exposure in their business transactions. The two most commonly used mechanisms are collateral arrangements and close-out netting.

Netting is very common in advanced economies where the settlement is based on net positions in bilateral or multilateral financial arrangements rather than by gross-positions.

The Financial Stability Board recommended as part of its recommendations of the Key Attributes of Effective Resolution Regimes for Financial Institutions that the legal framework governing set-off rights, contractual netting and collateralisation agreements should be clear, transparent and enforceable during a crisis or resolution of firms, and should not impede the effective

implementation of resolution measures. Several global standards on insolvency law prescribe specific recommendations for the enactment of safeguards for financial contracts, particularly netting and collateral arrangements to provide certainty to financial transactions and to maintain financial stability. The recommendations number 101-107 of the UNCITRAL Guide on Insolvency emphasise that netting and set-off may reduce the potential for systemic risk that could negatively affect the stability of financial markets by providing certainty with respect to the rights of parties to a financial contract when one of those parties defaults.

The present legal framework in India does not allow netting of bilateral financial contracts {over-the-counter derivatives (OTC)}, while it is allowed for multilateral transactions. Therefore, the financial contracts intermediated through the central counter-parties, like clearing corporations, get the benefit of netting under the Payment and Settlement Systems Act, 2007 and under the securities laws. However, in the absence of any legally unambiguous basis for finality of bilateral netting for certain entities, the Reserve Bank of India (RBI) currently does not allow bilateral netting of mark-to-market values arising on account of OTC derivatives, forcing the banks to provide capital on gross basis for such derivatives, trapping large amount of capital unproductively with banks. However, calculating the regulatory capital on gross-exposure basis is inefficient over calculating that on net-exposure basis.

Introduction of Bill

Value of bilateral derivative contracts is estimated by the Clearing Corporation of India to be Rs. 56,33,257 crores as of March 2018.

It is just the bilateral contracts which do not have any firm legal basis. Bilateral contracts constitute 40 per cent of total financial contracts, while multilateral contracts constitute 60 per cent.

The Bill is critical for financial stability in the country. This Bill actually brings in a firm legal basis for bilateral netting between two counter parties. Multilateral netting has already been taken care of.

The Bill has been brought in to address the lessons learnt from the 2008 global financial crisis and added that if the legislation was available in 2017, banks would have had Rs. 42,192 crore for onward lending, but they had to keep it locked up. If it was available in 2018, Rs. 45,956 crore would have been available while Rs. 67,792 crore would have been available in 2019 and this figure would have been Rs. 58,308 crore in March 2020.

The Bill was drafted considering 'International Swaps and Derivative Associations' and nearly 50 countries are using this legal framework. The Bill covers trades which are negotiated bilaterally, credit derivatives, commodity derivatives. The Bill provides a legal framework for bilateral netting of qualified financial contracts which are over the counter derivatives contracts.

Recognising that a legal framework for bilateral netting would provide substantial benefits to the financial sector, the Government announced in Budget 2020-21 that a legislation for bilateral Netting would be introduced in Parliament. Accordingly, the Bilateral Netting of Qualified Financial

Contracts Bill, 2020 ("the Bill") was introduced in the Lok Sabha on September 14, 2020 and passed in Lok Sabha and Rajya Sabha on September 20, 2020 and September 23, 2020 respectively. The Bill is based on the similar legal frameworks of other countries and global standard setting bodies.

The Bilateral Netting of Qualified Financial Contracts Act, 2020 has received the assent of the President on the September 28, 2020 and was published in the Gazette of India Extraordinary on the September 28, 2020. The Act has been brought into force on October 1, 2020.

The Act had been brought by keeping the question of how non-centrally cleared derivative contracts underline the risk from the various lessons learned in the 2008 global financial crisis.

The Act provides a legal framework for bilateral netting of qualified financial contracts. Netting refers to offsetting of all claims arising from dealings between two parties to determine a net amount payable or receivable from one party to another. The Act allows for enforcement of netting for qualified financial contracts. The provisions of the Act will apply to Qualified Financial Contracts between two qualified financial market participants where at least one party is an entity regulated by the specified authorities RBI, SEBI, IRDAI, PFRDA or the IFSCA.

The Act, *inter alia*, provides for, –

1. Designation of any bilateral agreement or contract or transaction, or type of contract, as qualified financial contract by the Central Government or any of the regulatory authorities as specified in the First Schedule;
2. Enforceability of netting of a qualified financial contract;
3. Invocation of close-out netting which may be commenced by a notice given by one party to the other party of a qualified financial contract upon the occurrence of an event of default with respect to the other party or a termination event that may, in certain circumstances, occur automatically as specified in the netting agreement;
4. Determination of the net amount payable under the close-out netting in accordance with the terms of the netting agreement entered into by the parties and in the absence of the netting agreement, where the parties to a qualified financial contract fail to agree on the sum with regard to the net amount payable under the close-out netting, determination of such sum through arbitration; and
5. Imposing of certain limitations on powers of administration practitioner such that the close-out netting would be final and irreversible and any insolvency proceedings would not affect the netting.

Bilateral netting

Netting refers to offsetting of all claims arising from dealings between two parties, to determine a net amount payable or receivable from one party to other. The Bill allows for enforcement of netting for qualified financial contracts.

- Bilateral netting reduces the overall number of transactions between the two counterparties. Therefore, actual transaction volume between

the two decreases. So does the amount of accounting activity and other costs and fees associated with an increased number of trades.

- While the convenience of reduced transactions is a benefit, the primary reason two parties engage in netting is to reduce risk. Bilateral netting adds additional security in the event of bankruptcy to either party. By netting, in the event of bankruptcy, all of the swaps are executed instead of only the profitable ones for the company going through the bankruptcy. For example, if there was no bilateral netting, the company going into bankruptcy could collect on all in-the-money swaps while saying they can't make payments on the out-of-the-money swaps due to the bankruptcy.
- Netting consolidates all swaps into one so the bankrupt company could only collect on in-the-money swaps after all out-of-the-money swaps are paid in full. Basically, it means that the value of the in-the-money swaps must be greater than the value of the out-of-the-money swaps for the bankrupt company to get any payments.

The positive values in the financial statements are adjusted against the negative values to give the 'net' financial position of the participant. Netting Agreements include both the one entered into by the financial parties and the collateral agreement (security or collateral agreement, margin and other credit enhancement agreements such as pledge or guarantee) forming a part of the netting agreement entered into by the parties.

Qualified financial contracts (QFC)

QFC means any bilateral contract notified as a QFC by the relevant authority. The authority can be Reserve Bank of India (RBI), Securities and Exchange Board of India (SEBI), Insurance Regulatory and Development Authority of India (IRDAI), Pension Fund Regulatory and Development Authority (PFRDA) or International Financial Services Centres Authority (IFSCA). The Central Government may, by notification, exclude contracts between certain parties or containing certain terms from being designated as QFCs.

Enforceability of netting

The Act provides that netting of QFCs is enforceable if the contract has a netting agreement. Netting agreement is an agreement that provides for the netting of amounts involving two or more QFCs. A netting agreement may also include a collateral arrangement. Collateral arrangement is a form of security provided for one or more QFCs in a netting agreement. It may include a pledge of assets, or an arrangement to transfer the title to a collateral or a third-party guarantor.

Enforceability of close-out netting

Close-out netting is enforceable against an insolvent party and against the person providing collateral (if applicable) such as guarantor. Close-out netting is also enforceable against a party placed under administration, notwithstanding any injunction, moratorium, insolvency, resolution, winding up or order of a court issued under any law.

Close-out netting arrangement

Close-out netting refers to the termination of all obligations arising out of relevant QFCs. The process may be initiated by a party to the QFC in the case of: (*i*) a default (failure to honour the obligations of a QFC) by the other party, or (*ii*) a termination event, as specified in the netting agreement that gives one or both parties the right to terminate transactions under the agreement. In case where one party to the agreement is placed under administration, the consent of such party or the administration practitioner is not required. Administration refers to imposition of moratorium, proceedings of winding up, insolvency or bankruptcy, among others. Administration practitioner is the entity that administers the affairs of the party.

- The parties to a QFC must ensure that all obligations owed by one party to the other, under the contract, are replaced by a single net amount. The netting will have the effect of liquidating present and future obligations arising out of QFCs to which the netting agreement applies. The net amount payable/ receivable under the close-out netting would be determined: (*i*) in accordance with the netting agreement entered into by the parties, if one exists, or (*ii*) through agreement between the parties, or (*iii*) through arbitration. Unless the agreement specifies otherwise, collateral provided under a collateral arrangement may be liquidated without consent from any entity.

Net Amount for Close-Out Netting:

- The amount payable at the time of close-out netting will be according to the netting agreement and in case of absence of netting agreement then sum shall be followed by arbitration.

- The most common kind of agreements are swap ones for cancelling out of claims, which have now become prevalent. The provisions relating to close-out netting specifically stated under this Act streamline the process for the same. Close-out netting essentially means that due

to default or insolvency of one of the parties, the obligations under the contract are terminated and the net balance of receivable or payable is taken into account. The amount for this has to be decided in accordance with the netting agreement.

- The effect of invocation of close-out netting is that first, the obligations are immediately terminated, liquidation of any of the parties takes place or there can be acceleration of any payment (future or present), and second, that net payable balance is determined, which is to be paid by one of the parties to the netting agreement. In case, under the terms of the netting agreement, parties fail to come to a conclusion with regard to the net amount, or if there was no netting agreement in place initially, the net amount can be determined by way of arbitration as well.

Significance

- The Act would reduce the capital burden and credit exposure of banks with other financial institutions from gross to net exposure which ultimately lowers the cost of the transaction and overall systematic risk.
- The Act passes the way to develop a corporate default swap market and provides the corporate bond market to get energized with the buoyant bond market.
- The money locked up in banks not available for the starved economy will get liquidated and lubricated resulting reduction in hedging cost thereby encouraging over-the-counter derivatives.
- It identifies the right to consider a margin exchanged under credit documents like title transfer arrangement.
- This legislation supersedes the Insolvency and Bankruptcy Code (IBC) which gives a better recovery mechanism for the existing business for their financial contract.
- Domino effect- the bilateral netting act comes as a domino effect in the Indian Derivative market and similar. This effect is witnessed in the draft of the variation margin direction released by the Reserve Bank of India relating to public consultation.

Benefits for the financial sector

- Without bilateral netting, Indian banks have had to *set aside* higher capital against their trades in the over-the-counter market, which impacts their ability to participate in the market. Moreover, it also increases the systemic risk during defaults.
- The reduction in counterparty credit risk exposure through netting will strengthen resilience of the financial sector.
- The law would facilitate business exits by improving recovery mechanism for the qualified financial contract when counterparty to such a contract default.
- Bilateral netting would also help reduce

hedging costs and liquidity needs for banks, primary dealers and other market-makers, thereby encouraging participation in the over-the-counter derivatives market.

- It would also help develop the corporate default swaps market, which, in turn, would provide support to the development of the corporate bond market. It will also act as a catalyst for the development of the corporate bond market by energising the credit default swap market.
- It a milestone that will improve the financial health of the nation, by bringing in the much-needed liquidity, reducing transactional cost and boosting investor morale. It is a futuristic bill for financial markets.

Limitations on Powers of Administration Practitioner

The administrative practitioner cannot render ineffective;

- Any transfer, substitution, or exchange of cash, collateral, or any other interests in connection with a netting agreement between the insolvent party and the non-insolvent party to a QFC.
- Any payment or delivery obligation constituting fraudulent preference or a transfer for undervaluing, including during a suspect period by the insolvent party to the non-insolvent party.

Key Takeaways

- A bank's obligation, in the event of the default or insolvency of one of the parties, would be the net sum of all positive and negative fair values of contracts included in the bilateral netting arrangement. Netting refers to offsetting of all claims arising from dealings between two parties to determine a net amount payable or receivable from one party to another.
- Bilateral netting is when two parties combine all their swaps into one master swap, creating one net payment, instead of many, between the parties.
- Bilateral netting reduces accounting activity, complexity, and transactional cost, fees associated with more trades and payments.
- In the event of a bankruptcy, bilateral netting assures that the bankrupt company can't only take payments while opting not to payout on out-of-the-money swaps.

Conclusion

The new Act not only creates a better financial environment within India but also has a positive impact on the country's ease of doing business.

Netting essentially means setting off claims or obligations by eligible participants under qualified financial contracts in case of mutual dealing between the parties, including close-out netting, which is relevant for insolvency.

This is advantageous for two areas of banking and commercial law: one is the Over the Counter (OTC) Derivatives and the other, the resolution of insolvent companies. Initially, the Reserve Bank of India did not permit netting on derivative contracts. Now, since the Act lays down sufficient guidance on the same, the subsequent guidance and notification for its regulation by the RBI would guide the netting mechanism in such transactions

In cases of insolvency, the concept of close-out netting has been introduced, which is the most promising aspect of this legislation. The setting off of mutual debts is a common practice in developed foreign jurisdictions like the United States, Europe and the United Kingdom, so much so that they have incorporated it in their insolvency legislations such as the Insolvency Act, 1986 (UK), and otherwise also treat it as a part of common law. This stems from the fact that set-off becomes an instrument of substantial justice between the parties as it is treated as an automatic and mandatory process.

This becomes valuable not only for the corporate debtor or the creditors but also the personal and corporate guarantors of the corporate debtor. This is because currently their liability is co-extensive with the corporate debtor but they do not have the absolute right of subrogation even after payment of the debt on behalf of the corporate debtor. This Act also puts reasonable restrictions on the power of the administration practitioner (including the resolution professional, liquidator, or receiver) for preserving the value of the assets of the insolvent financial party. Therefore, this Act not only creates a better financial environment within India but also has a positive impact on the ease of doing business.

Reference

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SUPREME COURT OF INDIA

Cognizance for Extension of Limitation, In re

A.V. RAMANA, CJ SURYA KANT AND A.S. BOPANNA, JJ.

MISCELLANEOUS APPLICATION NO. 665 OF 2021 SMW(C) NO. 3 OF 2020

APRIL 27, 2021

Section 5 of the Limitation Act, 1963, read with articles 141 and 142 of the Constitution of India - Extension of prescribed period in certain cases - Supreme Court in its order dated 23-3-2020 in Cognizance for Extension of Limitation, In re (2020) 117 taxmann.com 66, ordered extension of period of limitation in filing petitions/suits/applications/appeals/all other proceedings on account of COVID-19 - Thereafter, on 8-3-2021 it was noticed that country was returning to normalcy and since all Courts and Tribunals had started functioning either physically or by virtual mode, extension of limitation was regulated and brought to an end - Whether in view of extraordinary situation caused by sudden and second outburst of COVID-19 virus, Supreme Court restored order dated 23-3-2020 and directed that period(s) of limitation, as prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings, whether condonable or not, shall stand extended till further orders - Held, yes (Para 6)

FACTS

- Supreme Court took *suo motu* cognizance of the situation arising out of the challenge faced by the country on account of COVID-19 Virus and resultant difficulties that could be faced by the litigants across the country. Consequently, it was directed *vide* order dated 23-

3-2020 that the period of limitation in filing petitions/applications/suits/ appeals/all other proceedings, irrespective of the period of limitation prescribed under the general or special laws, shall stand extended with effect from 15-3-2020 till further orders.

- Thereafter, on 8-3-2021 it was noticed that the country was returning to normalcy and since all the Courts and Tribunals had started functioning either physically or by virtual mode, extension of limitation was regulated and brought to an end.

- The *suo motu* proceedings were, disposed of issuing the directions as to in computing the period of limitation for any suit, appeal, application or proceeding, the period from 15-3-2020 till 14-3-2021 shall stand excluded. Consequently, the balance period of limitation remaining as on 15-3-2020, if any, shall become available with effect from 15-3-2021.

- Supreme Court Advocate on Record Association (SCAORA) filed Interlocutory Application by which it highlighted the daily surge in COVID cases in Delhi and how difficult it had become for the Advocates-on-Record and the litigants to institute cases in Supreme Court and other courts in Delhi. Consequently, restoration of the order dated 23-3-2020 has been prayed for.

HELD

- The Court has taken judicial notice of the fact that the steep rise in COVID-19 Virus cases is not limited to Delhi alone but it has engulfed the entire nation. The extraordinary situation caused by the sudden and second outburst of COVID-19 Virus, thus, requires extraordinary measures to minimize the hardship of litigant-public in all the States. Therefore, the order dated 23-3-2020 is restored and in continuation of the order dated 8-3-2021, it is directed that the period(s) of limitation, as prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings, whether condonable or not, shall stand extended till further orders. (Para 6)

- It is further clarified that the period from 14-3-2021 till further orders shall also stand excluded in computing the periods prescribed under sections 23(4) and 29A of the Arbitration and Conciliation Act, 1996, section 12A of the Commercial Courts Act, 2015 and provisos (*b*) and (*c*) of section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the Court or Tribunal can condone delay) and termination of proceedings. (Para 7)

- This order is passed in exercise of our powers under article 142 read

with article 141 of the Constitution of India. Hence it shall be a binding order within the meaning of article 141 on all Courts/Tribunals and Authorities. (Para 8)

Shivaji M. Jadhav, **Manoj K. Mishra**, **Joseph S. Aristotle**, **Ms. Diksha Rai**, **Nikhil Jain**, **Atulesh Kumar**, **Dr. Aman Hingorani**, **Ms. Anzu Varkey**, **Sachin Sharma**, **Aljo Joseph**, **Varinder Kumar Sharma**, Advs., **Abhinav Ramkrishna** AOR, *for the Applicant*. **K.K. Venugopal**, AG, **Tushar Mehta**, SG, **Rajat Nair**, **Kanu Agrawal**, **Siddhant Kohli**, **Ms. Chinmayee Chandra**, **B.V. Balaram Das**, Advs., **Divyakant Lahoti**, AOR, **Parikshit Ahuja**, **Ms. Praveena Bisht**, **Ms. Madhur Jhavar**, **Ms. Vindhya Mehra**, **Kartik Lahoti**, **Rahul Maheshwari**, **Abhimanyu Tewari** and **Ms. Eliza Barr**, Advs. *for the Respondent*.

For Full Text of the Judgment see

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SUPREME COURT OF INDIA

Ghanashyam Mishra & Sons (P.) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd.

R.F. NARIMAN, B.R. GAVAI AND HRISHIKESH ROY, JJ.

CIVIL APPEAL NOS. 8129 OF 2019 & 1550 TO 1554 OF 2021

APRIL 13, 2021

Section 31, read with section 238, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Whether amendment to section 31 by IBC (Amendment) Act, 2019 is, declaratory clarificatory in nature and therefore, will be effective from date on which I & B Code has come into effect - Held, yes - Whether once a resolution plan is duly approved by Adjudicating Authority under sub-section (1) of section 31, claims as provided in resolution plan shall stand frozen and will be binding on corporate debtor and its employees, members, creditors, including Central Government, any State Government or any local authority, guarantors and other stakeholders - Held, yes - Whether, therefore, all dues including statutory dues owed to Central Government, any State Government or any local authority, if not part of resolution plan, shall stand extinguished and no proceedings in respect of such dues for period prior to date on which Adjudicating Authority grants its approval under section 31 could be continued - Held, yes (Paras 87, 94 and 95)

Section 5(20), read with sections 3(10) and 5(21), of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Operational creditor - Whether even a claim in respect of dues arising under any law for time being in force and payable to Central Government, any State Government or any local authority would come within ambit of 'operational debt' - Held, yes - Whether thus, Central Government, any State Government or any local authority to whom an operational debt is owed would come within ambit of 'operational creditor' as defined under sub-section (20) of section 5 - Held, yes (Para 91)

FACTS

- The Corporate Insolvency Resolution Process (CIRP) was initiated in respect of the corporate debtor by an application under section 7 filed by the State Bank of India.
- The NCLT admitted application and declared moratorium.
- Later, Resolution Plan proposed by GMSPL was approved by more than 89.23 per cent of the voting share of financial creditors of the corporate debtor.
- One application came to be filed by EARC challenging the decision of RP in not admitting its claim. The said

application was filed, contending, that its claim stood on the strength of corporate guarantee provided by the corporate debtor against the take-out facility provided to APNRL, being sister concern of the corporate debtor.

- The NCLT by an elaborate order approved the Resolution Plan of GMSPL and applications filed by EARC, the respondent No. 1 herein, came to be rejected.

- On appeal, the NCLT while holding, that RP was justified in not accepting the claim of EARC and that NCLT had rightly rejected the application filed by EARC, however, observed that the rejection of the claim for the purpose of collating and making it part of the Resolution Plan will not affect the right of EARC to invoke the Bank Guarantee against the corporate debtor, in case the principal borrower failed to pay the debt amount, since the moratorium period had come to an end.

- The Jharkhand High Court in case of a corporate debtor (Electrosteel) rejected contention of corporate debtor that in view of section 31 once resolution plan was approved, claim made by State Government on account of VAT was not sustainable observing that resolution plan was not binding on State Government as it had not participated in CIRP proceedings.

- The Allahabad High Court in case of another corporate debtor rejected writ petition which challenged claim subsequent to approval of resolution plan on the ground that writ petitioner had an alternative remedy of filing the second appeal.

- On appeal to the Supreme Court:

HELD

- Bare reading of section 31 of the I&B Code would make it abundantly clear, that once the resolution plan is approved by the Adjudicating Authority, after it is satisfied, that the resolution plan as approved by CoC meets the requirements as referred to in sub-section (2) of section 30, it shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders. Such a provision is necessitated since one of the dominant purposes of the I & B Code is, revival of the corporate debtor and to make it a running concern. (Para 58)

- The resolution plan submitted by successful resolution applicant is required to contain various provisions, *viz.*, provision for payment of insolvency resolution process costs, provision for payment of debts of operational creditors, which shall not be less than the amount to be paid to such creditors in the event of liquidation of the corporate debtor under section 53; or the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been

distributed in accordance with the order of priority in sub-section (1) of section 53, whichever is higher. The resolution plan is also required to provide for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, which also shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor. *Explanation 1* to clause (*b*) of sub-section (2) of section 30 clarifies for the removal of doubts, that a distribution in accordance with the provisions of the said clause shall be fair and equitable to such creditors. The resolution plan is also required to provide for the management of the affairs of the corporate debtor after approval of the resolution plan and also the implementation and supervision of the resolution plan. Clause (*e*) of sub-section (2) of section 30 of I & B Code also casts a duty on RP to examine, that the resolution plan does not contravene any of the provisions of the law for the time being in force. (Para 59)

- Perusal of section 29 of I & B Code read with Regulation 36 of the Regulations would reveal, that it requires RP to prepare an information memorandum containing various details of the corporate debtor so that the resolution applicant submitting a plan is aware of the assets and liabilities of the corporate debtor, including the details about the creditors and the amounts claimed by them. It is also required to contain the details of guarantees that have been given in relation to the debts of the corporate debtor by other persons. The details with regard to all material litigation and an ongoing investigation or proceeding initiated by Government and statutory authorities are also required to be contained in the information memorandum. So also the details regarding the number of workers and employees and liabilities of the corporate debtor towards them are required to be contained in the information memorandum. (Para 60)

- All these details are required to be contained in the information memorandum so that the resolution applicant is aware, as to what are the liabilities, that he may have to face and provide for a plan, which apart from satisfying a part of such liabilities would also ensure, that the corporate debtor is revived and made a running establishment. The legislative intent of making the resolution plan binding on all the stakeholders after it gets the seal of approval from the Adjudicating Authority upon its satisfaction, that the resolution plan approved by CoC meets the requirement as referred to in sub-section (2) of section 30 is, that after the approval of the resolution plan, no surprise claims should be flung on the successful resolution applicant. The dominant purpose is, that he should start with fresh slate on

the basis of the resolution plan approved. (Para 61)

- In view of this legal position, the observation made by NCLAT in the appeal filed by EARC to the effect, that EARC was entitled to take recourse to such remedies as are available to its in law, is impermissible in law. (Para 63)

- *Vide* section 7 of Act No. 26 of 2019 (vide S.O. 2953 (E), dated 16-8-2019 with effect from 16-8-2019), the following words have been inserted in section 31 of I & B Code,—

> 'including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed'. (Para 66)

- As such, with respect to the proceedings, which arise after 16-8-2019, there will be no difficulty. After the amendment, any debt in respect of the payment of dues arising under any law for the time being in force including the ones owed to the Central Government, any State Government or any local authority, which does not form a part of the approved resolution plan, shall stand extinguished. (Para 67)

- The only question, which remains is, what happens to such dues if they pertain to a period wherein section 7 petitions have been admitted prior to 16-8-2019. (Para 68)

- To answer the said question, one will have to consider, as to whether the said amendment is clarificatory/declaratory in nature or a substantive one. If it is held, that it is declaratory or clarificatory in nature, it will have to be held, that such an amendment is retrospective in nature and exists on the statute book since inception. However, if the answer is otherwise, the amendment will have to be held to be prospective in nature, having force from the date on which the amendment is effected in the statute. (Para 69)

- It will be relevant to refer to the 'Statement of Objects and Reasons' (hereinafter referred to as 'SOR') of the Insolvency and Bankruptcy Code (Amendment) Bill, 2019. (Para 70)

- Perusal of the SOR would reveal, that one of the prime objects of I & B Code was to provide for implementation of insolvency resolution process in a time bound manner for maximisation of value of assets in order to balance the interests of all stakeholders. However, it was noticed, that in some cases there was extensive litigation causing undue delays resultantly hampering the value maximisation. It was also found necessary to ensure, that all creditors are treated fairly. It was therefore in view of the various difficulties faced and in order to fill the critical

gaps in the corporate insolvency framework, it was necessary to amend certain provisions of the I & B Code. Clause (*f*) of para 3 of the SOR of the Insolvency and Bankruptcy Code (Amendment) Bill, 2019 would amply make it clear, that the legislative intent in amending sub-section (1) of section 31 was to clarify, that the resolution plan approved by the Adjudicating Authority shall also be binding on the Central Government, any State Government or any local authority to whom a debt is owed in respect of payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, including tax authorities. (Para 71)

- In the Rajya Sabha speech, the Finance Minister has categorically stated, that section 238 provides that I & B Code will prevail in case of inconsistency between two laws. She also stated, that there was question about indemnity for successful resolution applicant and that the amendment was clearly making it binding on the Government. She stated, that the Government will not make any further claim after resolution plan is approved. So, that is going to be a major sense of assurance for the people who are using the resolution plan. She has categorically stated, that she would want all the Members to recognize this message and communicate further that I & B Code gives that comfort to all new bidders. They need not be scared that the Taxmann will come after them for the faults of the earlier promoters. She further states, that once the resolution plan is accepted, the earlier promoters will be dealt with as individuals for their criminality but not the new bidder who is trying to restore the company. (Para 73)

- It is clear, that the mischief, which was noticed prior to amendment of section 31 was, that though the legislative intent was to extinguish all such debts owed to the Central Government, any State Government or any local authority, including the tax authorities once an approval was granted to the resolution plan by NCLT; on account of there being some ambiguity, the State/ Central Government authorities continued with the proceedings in respect of the debts owed to them. In order to remedy the said mischief, the Legislature thought it appropriate to clarify the position, that once such a resolution plan was approved by the Adjudicating Authority, all such claims/dues owed to the State/Central Government or any local authority including tax authorities, which were not part of the resolution plan shall stand extinguished. (Para 77)

- One of the principal objects of I & B Code is, providing for revival of the corporate debtor and to make it a going concern. I & B Code is a complete Code in itself. Upon admission of petition under section

7, there are various important duties and functions entrusted to RP and CoC. RP is required to issue a publication inviting claims from all the stakeholders. He is required to collate the said information and submit necessary details in the information memorandum. The resolution applicants submit their plans on the basis of the details provided in the information memorandum. The resolution plans undergo deep scrutiny by RP as well as CoC. In the negotiations that may be held between CoC and the resolution applicant, various modifications may be made so as to ensure, that while paying part of the dues of financial creditors as well as operational creditors and other stakeholders, the corporate debtor is revived and is made an on-going concern. After CoC approves the plan, the Adjudicating Authority is required to arrive at a subjective satisfaction, that the plan conforms to the requirements as are provided in sub-section (2) of section 30. Only thereafter, the Adjudicating Authority can grant its approval to the plan. It is at this stage, that the plan becomes binding on corporate debtor, its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. The legislative intent behind this is, to freeze all the claims so that the resolution applicant starts on a clean slate and is not flung with any surprise claims. If that is permitted, the very calculations on the basis of which the resolution applicant submits its plans, would go haywire and the plan would be unworkable. (Para 86)

- The word 'other stakeholders' would squarely cover the Central Government, any State Government or any local authorities. The legislature, noticing that on account of obvious omission, certain tax authorities were not abiding by the mandate of I & B Code and continuing with the proceedings, has brought out the 2019 amendment so as to cure the said mischief. Therefore, the 2019 amendment (in section 31) is declaratory and clarificatory in nature and, therefore, retrospective in operation. (Para 87)

- Harmonious construction of sub-section (10) of section 3 read with sub-sections (20) and (21) of section 5 thereof would reveal, that even a claim in respect of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority would come within the ambit of 'operational debt'. The Central Government, any State Government or any local authority to whom an operational debt is owed would come within the ambit of 'operational creditor' as defined under sub-section (20) of section 5. Consequently, a person to whom a debt is owed would be covered by the definition of 'creditor' as defined under sub-section (10) of

section 3. As such, even without the 2019 amendment, the Central Government, any State Government or any local authority to whom a debt is owed, including the statutory dues, would be covered by the term 'creditor' and in any case, by the term 'other stakeholders' as provided in sub-section (1) of section 31. (Para 91)

- Therefore, the aforesaid provisions leave no manner of doubt to hold, that the 2019 amendment is declaratory and clarificatory in nature. Even if 2019 amendment was effected, still in light of the view taken by the Court, the Central Government, any State Government or any local authority would be bound by the resolution plan, once it is approved by the Adjudicating Authority (I.e. NCLT). (Para 94)

Conclusion

(*i*) Once a resolution plan is duly approved by the Adjudicating Authority under sub-section (1) of section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the Corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the Adjudicating Authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect of a claim, which is not part of the resolution plan;

(*ii*) 2019 amendment to section 31 is clarificatory and declaratory in nature and, therefore, will be effective from the date on which I & B Code has come into effect;

(*iii*) Consequently, all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the Adjudicating Authority grants its approval under section 31 could be continued. (Para 95)

- Thus, the observation made by NCLAT giving liberty to EARC to take recourse to such proceedings as available in law for raising its claims is totally unsustainable. (Para 123)

CASE REVIEW

Edelweiss Asset Reconstruction Co. Ltd. v. *Orissa Manganese and Minerals Ltd.* (2019) 106 taxmann.com 18 (NCL-AT) (para 125); *Electrosteel Steels Ltd.* v. *State of Jharkhand* (2021) 125 taxmann.com 421 (Jhar.) (para 148) *Ultra Tech Nathdwara Cement Ltd.* v. *State of UP* (2021) 125 taxmann.com 420 (All.) (para 132) *set aside*.

Ultra Tech Nathdwara Cement Ltd. v. *Union of India* (2020) 116 taxmann.com

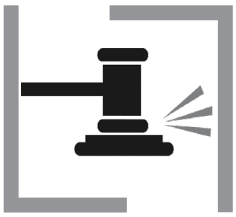
152 (Raj.) and *Akshay Jhunjhunwala* v. *Union of India* (2018) 92 taxmann.com 180/147 SCL 163 (Cal.) (para 93) *affirmed*.

CASES REFERRED TO

Committee of Creditors of Essar Steel India Ltd. v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC) (para 25), *K. Shashidhar* v. *Indian Overseas Bank* (2019) 102 taxmann.com 139/152 SCL 312 (SC) (para 31), *Maharashtra Seamless Ltd.* v. *Padmanabhan Venkatesh* (2020) 113 taxmann.com 421/158 SCL 567 (SC) (para 31), *Karad Urban Cooperative Bank Ltd.* v. *Swwapnil Bhingardevay* (2020) 119 taxmann.com 46/161 SCL 457 (SC) (para 31), *Kalpraj Dharamshi* v. *Kotak Investment Advisors Ltd.* (2021) 125 taxmann.com 194 (SC) (para 31), *Banarasi* v. *Ram Phal* (2003) 9 SCC 606 (para 33), *State Bank of India* v. *V. Ramakrishnan* (2018) 96 taxmann.com 271/149 SCL 107 (SC) (para 35), *B.K. Educational Services (P.) Ltd.* v. *Parag Gupta & Associates* (2018) 98 taxmann.com 213/150 SCL 293 (SC) (para 35), *Innoventive Industries Ltd.* v. *ICICI Bank Ltd.* (2017) 84 taxmann.com 320/143 SCL 625 (SC) (para 50), *Pr. CIT* v. *Monnet Ispat and Energy Ltd.* (SLP(C) No. 6483 of 2018, dated 10-8-2018) (para 64), *K.P. Varghese* v. *ITO* (1981) 7 Taxman 13/131 ITR 597 (SC) (para 74), *Union of India* v. *Martin Lottery Agencies Ltd.* (2009) 20 STT 203 (SC) (para 75), *Zile Singh* v. *State of Haryana* (2004) 8 SCC 1 (para 79), *CIT* v. *Gold Coin Health Food (P.) Ltd.* (2008) 172 Taxman 386/304 ITR 308 (SC) (para 83), *Ultra Tech Nathdwara Cement Ltd.* v. *Union of India* (2020) 116 taxmann.com 152 (Raj.) (para 92), *Akshay Jhunjhunwala* v. *Union of India* (2018) 92 taxmann.com 180/147 SCL 163 (Cal.) (para 93), *Export Import Bank of India* v. *Resolution Professional JEKPL (P.) Ltd.* (2018) 97 taxmann.com 194 (NCL - AT) (para 115), *Ultra Tech Nathdwara Cement Ltd.* v. *State of UP* (2021) 125 taxmann.com 420 (All.) (para 126), *Babu Ram Prakash Chandra Maheshwari* v. *Antarim Zilla Parishad Muzaffarnagar* (1969) 1 SCR 518 (para 129), *Whirlpool Corpn.* v. *Registrar of Trade Marks* (1998) 8 SCC 1 (para 129), *Nivedita Sharma* v. *Cellular Operators Association of India* (2011) 14 SCC 337 (para 129) and *Embassy Property Developments (P.) Ltd.* v. *State of Karnataka* (2019) 112 taxmann.com 56/ (2020) 157 SCL 445 (SC) (para 129).

E.C. Agrawala, AOR and **Ms. Anne Mathew**, AOR *for the Appellant*. **Rabin Majumder**, AOR, **Bhakti Vardhan Singh**, AOR, **Pankaj Pandey**, Adv., **Rajiv Shankar Dvivedi**, Adv., **Kumar Anurag Singh**, Adv., **Saurabh Jain**, Adv., **Zain Khan**, Adv., **Shwetank Singh**, Adv., **Ms. Tulika Mukherjee**, AOR, **Raj Kumar Mehta**, AOR, **Ms. Himanshi Andey**, Adv., **Sandeep Bajaj**, Adv., **Soayib Qureshi**, AOR, **Ms. Aditi Pundhir**, Adv., **Buddy A. Ranganadhan**, Adv. **A.V. Rangam**, AOR, **Amit Kumar Mishra**, Adv., **Siddharth Sharma**, Adv., **Shashank Gautam**, Adv., **Shashank Manish**, AOR, **Arving Thapliyal**, Adv., **Manik Ahluwalia**, Adv., **Ms.Smriti Shah**, Adv. and **Ms.Nidhi Sahay**, Adv. *for the Respondent*.

For Full Text of the Judgment see
(2021) 126 taxmann.com 132 (SC)



(2021) 127 taxmann.com 38 (SC)

SUPREME COURT OF INDIA

Sandeep Khaitan v. JSVM Plywood Industries Ltd.

UDAY UMESH LALIT AND K.M. JOSEPH, JJ.

CRIMINAL APPEAL NO. 447 OF 2021

APRIL 22, 2021

Section 14, read with sections 17 and 19 of the Insolvency and Bankruptcy Code, 2016 and section 482 of the Code of Criminal Procedure, 1973 - Corporate insolvency resolution process - Moratorium - NCLT admitted an application under section 7 against corporate debtor - Appellant was appointed as Interim Resolution Professional (IRP) and was subsequently confirmed as RP and a moratorium was declared - Appellant alleged that former directors of corporate debtor in conspiracy with Respondent No. 1 company transferred Rs. 32.50 lakhs from corporate debtor's bank account without appellant's sanction in violation of section 14 - Appellant-RP filed an FIR which was challenged by respondent No. 1 in a petition under section 482 of Code of Criminal Procedure before High Court - Respondent No. 1 also filed an application for allowing it to use its bank account over which lien had been created and accounts of its creditors frozen in connection with FIR - High Court by order allowed respondent No. 1's application - Appellant on appeal submitted that High Court had overlooked limits of its power in passing impugned order- Whether power under section 482 may not be available to Court to countenance breach of a statuary provision - Held, yes - Whether words 'to secure ends of justice' in section 482 of Code of Criminal Procedure cannot mean to overlook undermining of a statutory dictate, viz., provisions of section 14 and section 17 of IBC - Held, yes - Whether with appointment of IRP, powers of Board of Directors of corporate debtor get suspended and such powers are to be exercised by IRP as provided in section 17 of IBC - Whether in view of this position, transaction of Rs. 32.50 lakhs without appellant's consent was not in accordance with law - Held, yes - Whether therefore, High Court's order allowing respondent No. 1 to operate account without first remitting Rs. 32.50 lakhs into account of corporate debtor was violative of the moratorium in section 14 of IBC - Held, yes - Whether therefore High Court's order was to be modified to effect that respondent would be allowed to operate its account subject to payment of Rs. 32.50 lakhs into corporate debtors account - Held, yes (Paras 24 and 25)

Words and Expressions : 'Expression' to secure ends of justice as appearing in section 482 of Code of Criminal Procedure, 1973

FACTS

- The NCLT admitted an application under section 7 against NPIL, the corporate debtor. The appellant

was appointed as the Interim Resolution Professional (IRP) and was subsequently confirmed as the RP. Thereafter, a moratorium was declared and with the declaration of the moratorium the prohibitions as enacted in section 14 came into force.

- The appellant alleged that the former Managing Director of the corporate debtor in conspiracy with the Respondent No. 1 company transferred Rs. 32.50 Lakhs from the corporate debtor's bank account without the appellant's sanction in violation of section 14 of the IBC.
- Thereafter, the RP filed an FIR which was challenged by the Respondent No. 1 in a section 482 petition before the High Court. The Respondent No. 1 also filed an application for allowing it to use its bank account over which lien had been created and the frozen accounts of its creditors.
- The High Court by order lifted the lien created on the Respondent No. 1's bank account noting that the freezing of bank accounts resulted in unnecessary hardship which had no bearing on the investigation of the FIR, and allowed the Respondent No. 1 to operate the bank account over which lien had been created and the accounts of its creditors frozen in connection with the FIR.
- Thereafter, appeal was filed by appellant, Resolution Professional challenging the order of the High Court allowing Respondent No. 1 to operate its bank account over which lien had been created.

HELD

- In the instant case by 26-8-2019 an application filed under section 7 of the IBC was admitted, the appellant appointed as the interim resolution professional and what is more a moratorium declared. With the declaration of the moratorium the prohibitions as enacted in section 14 came into force. It is clear that the assets of the company would include the amounts lying to the credit in the bank accounts. There cannot be any dispute that well after the order under section 14 was passed, a sum of Rs. 32.50 lakhs has been remitted into the account of Respondent No. 1 company. No doubt it is the definite case of the Respondent No. 1 that it has had business relations with the Corporate Debtor since more than 15 years and that the amount remitted in its account represented the price of the materials supplied to the corporate debtor. Apart from this amount a sum of rupees more than Rs. 39 lakhs is still due. It is to be noticed that though an appeal was filed against the order admitting the petition under section 7 the same was dismissed by the NCLAT. The appellate order was undoubtedly *set aside* by this court and the appeal remanded to the NCLT for its consideration. One would think that setting aside the appellate order of the NCLAT

by this court and remanding the appeal would not have the effect of setting aside the order admitting the application. Initially, as was noticed, an order was passed on 28-2-2020. The ambiguity created by the said order was removed by the subsequent order of the Tribunal dated 20-3-2020. In other words, by the order dated 20-3-2020 the NCLT, Guwahati ordered that the appellant was at liberty to act as per law and the words used in the earlier order dated 28-2-2020 relied upon by the Respondent No. 1 were found to be a mere casual observation which did not culminate into any direction. Nothing needs to be said further, particularly in view of the fact that there is an FIR and which is pending consideration in the High Court also. It is significant to notice that the appellant is essentially aggrieved by the transactions representing a sum of Rs. 32.50 lakhs all of which took place after order dated 20-3-2020. (Para 16)

- It may be true that in the interim order passed by the NCLT Guwahati, the Tribunal had directed the Directors to refund the amount of the Corporate Debtor less any amount paid for supplies. It is also true that the review petition filed by the appellant is dismissed, essentially based on the limitations on the power of review. (Para 17)

- The provisions of the IBC contemplate resolution of the insolvency if possible, in the first instance and should it not be possible, the winding up of the corporate debtor. The role of the insolvency professional is neatly carved out. From the date of admission of application and the appointment of Interim Resolution Professional, the management of the affairs of the corporate debtor is to vest in the Interim Resolution Professional. With such appointment, the powers of the Board of Directors or the partners of the corporate debtor as the case may be are to stand suspended. Section 17 further declares that the powers of the Board of Directors or partners are to be exercised by the Interim Resolution Professional. The financial institutions are to act on the instructions of the Interim Resolution Professional. Section 14 is emphatic, subject to the provisions of sub-sections (2) and (3). The impact of the moratorium includes prohibition of transferring, encumbering, alienating or disposing of by the Corporate Debtor of any of its assets. (Para 18)

- Sub-section (2) provides that the supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period. (Para 19)

- Essential goods and services referred to in section 14(2) has been defined by Regulations. Regulation 32 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process For Corporate Persons) Regulations, 2016, provides that essential goods

and services referred to in section 14(2) shall mean Electricity; water; telecommunication services; and information technology services, to the extent these are not a direct input to the output produced or supplied by the corporate debtor. *Illustration*- Water supplied to a corporate debtor will be essential supplies for drinking and sanitation purposes, and not for generation of hydro-electricity.(Para 20)

- Also, undoubtedly sub-section (2A) of section 14 provides that where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified. (Para 21)

- This provision was inserted with effect from 28-12-2019. No doubt under this provision goods or services not covered by section 14(2) are also covered. The call however is to be taken by the IRP/RP. Raw material supply could fall within the provision. The IRP/RP must take a decision guided purely by the object of the IBC and the provisions and the factual matrix. (Para 22)

- With the appointment of Committee of Creditors, a Resolution Professional is to be appointed. The Resolution Professional is thereafter to conduct the resolution process and manage the operations. Section 23(2) makes it clear that his power is the same as the powers of the Interim Resolution Professional. Undoubtedly, the Resolution Professional is bound to seek prior approval of the Committee of Creditors in maters covered by section 28. (Para 23)

- In this context it is also essential to bear in mind that the High Court appears to have, in passing the impugned order, which is an interim order for that matter, overlooked the salutary limits on its power under section 482. The power under section 482 may not be available to the Court to countenance the breach of a statuary provision. The words `to secure the ends of justice' in section 482 cannot mean to overlook the undermining of a statutory dictate, which in this case is the provisions of section 14 and section 17 of IBC. (Para 24)

- It would appear that having regard to the orders passed by the NCLT admitting the application, under section 7, and also the ordering of moratorium under section 14 of the IBC and the orders which have been passed by the Tribunal otherwise, the impugned order of the High Court resulting in the Respondent

No. 1 being allowed to operate the account without making good the amount of Rs. 32.50 lakhs to be placed in the account of the corporate debtor cannot be sustained. The appellant has also no objection in the Respondent No. 1 being allowed to operate its account subject to it remitting an amount of Rs. 32.50 lakhs into the account of the corporate debtor. In such circumstances, Appeal is allowed. The Impugned order is modified as follows:

i. The Respondent No. 1 is allowed to operate its account subject to it to first remitting into the account of the corporate debtor, the amount of Rs. 32.50 lakhs which stood paid to it by the management of the corporate debtor. The assets of the corporate debtor shall be managed strictly in terms of the provisions of the IBC. The appellant as RP will bear in mind the provision of section 14(2A) and the object of IBC. It is however made clear that order shall not be taken as pronouncement on the issues arising from the FIR including the petition pending under section 482 of the Cr.P.C.

ii. It is also made clear that the judgment will not stand in the way of the Respondent No. 1 pursuing its claim with regard to its entitlement to a sum of Rs. 32.50 lakhs and any other sum from the corporate debtor or any other person in the appropriate forum and in accordance with law. There will be no order as to costs. (Para 25)

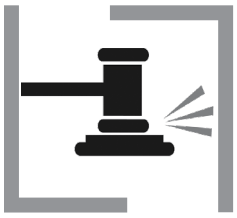
CASES REFERRED TO

P. Mohanraj v. *Shah Brothers Ispat (P.) Ltd.* (2021) 125 taxmann.com 39 (SC) (para 12).

Anand Varma , AOR, **Abhishek Prasad**, Adv. and **Ms. Astha Ahuja**, Adv. *for the Petitioner.* **Harish Pandey**, AOR, **C.K. Rai**, AOR, **Anshuman Tiwari**, Adv. and **Shuvodeep Roy**, AOR *for the Respondent.*

For Full Text of the Judgment see

(2021) 127 taxmann.com 38 (SC)



(2021) 127 taxmann.com 160 (Madras)

HIGH COURT OF MADRAS

Ruchi Soya Industries Ltd. v. Union of India

C. SARAVANAN, J.

W.P. NO. 31090 OF 2015 M.P. NO. 2 OF 2015

APRIL 26, 2021

Section 31 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Whether in view of decision of SC in Ghanashyam Mishra & Sons (P.) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd. (2021) 126 taxmann.com 132 if 'Customs duty' payable to respondent, customs department under subject Bill of Entry was not factored by corporate applicant in corporate resolution plan submitted before National Company Law Board, same would stood extinguished - Held, yes (Para 75)

CASE REVIEW

Ghanashyam Mishra and Sons (P.) Ltd. v. *Edelweiss Asset Reconstruction Co. Ltd.* (2021) 126 taxmann.com 132 (SC) (para 68) *followed*.

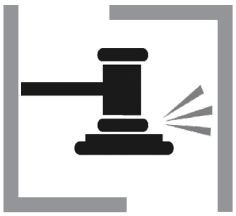
CASES REFERRED TO

Union of India v. *Param Industries Ltd.* (2015) 59 taxmann.com 208/51 GST 702 (SC) (para 8), *Ruchi Soya Industries Ltd.* v. *Union of India* 2016 (336) ELT 463 (Cal.) (para 9), *Ruchi Soya Industries Ltd.* v. *Union of India* 2017 (350) ELT 201 (Cal.) (para 9), *Committee of Creditors of Essar Steel India Ltd.* v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC) (para 17), *Swiss Ribbons (P.) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 62) and *Ghanashyam Mishra & Sons (P.) Ltd.* v. *Edelweiss Asset Reconstruction* (2021) 126 taxmann.com 132 (SC) (para 68).

Rajesh Rawal, Sr. Counsel and **Ms. V. Pushpa** *for the Petitioner*. **R. Hemalatha**, Sr. Standing Counsel *for the Respondent*.

For Full Text of the Judgment see

(2021) 127 taxmann.com 160 (Madras)



(2021) 127 taxmann.com 165 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Ministry of Corporate Affairs v. Amit Chandrakant Shah

A.I.S. CHEEMA, JUDICIAL MEMBER AND DR. ALOK SRIVASTAVA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INS) NO. 871 OF 2020†

APRIL 15, 2021

Section 66 of the Insolvency and Bankruptcy Code, 2016 read with section 213 of the Companies Act, 2013 - Corporate person's Adjudicating Authorities - Fraudulent or wrongful trading - Whether NCLT, on receipt of complaint of alleged violation, is not competent to directly ask Central Government to refer matter to 'Serious Fraud Investigation Office' for further investigation as there is a procedure required to be followed under section 213 (*b*) of Companies Act - Held, yes (Paras 11 and 12)

CASE REVIEW

Amit Chandrakant Shah v. *Hariharan Chandrashekhar* (2021) 126 taxmann.com 220 (NCLT - Beng.) (para 12) *set aside/ modified.* (***See Annex***)

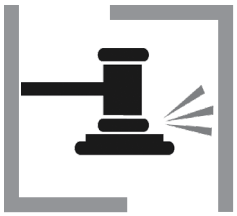
CASES REFERRED TO

Lagadapati Ramesh v. *Mrs. Ramanathan Bhuvaneshwari* (2020) 114 taxmann.com 348 (NCLAT - New Delhi) (para 7).

Vishal Mittal, Sr. Penal Counsel *for the Appellant.* **Ms. Chaitra Bhat**, **Sanjay Gupta** and **Ms. Puja Priyadarshini Thakur**, Advs. *for the Respondent.*

† Arising out of order *Amit Chandrakant Shah v. Hariharan Chandrashekhar* (2021) 126 taxmann.com 220 (NCLT - Beng.)

For Full Text of the Judgment see
(2021) 127 taxmann.com 165 (NCLAT - New Delhi)



(2021) 126 taxmann.com 147 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Union of India v. Vijay Kumar V. Iyer

JUSTICE BANSI LAL BHAT, ACTG. CHAIRPERSON

ANANT BIJAY SINGH, JUDICIAL MEMBER

AND SHREESHA MERLA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 733 OF 2020 AND OTHERS

APRIL 13, 2021

Section 53, read with section 18 of the Insolvency and Bankruptcy Code, 2016 and section 4 of the Indian Telegraph Act, 1885 - Corporate liquidation process - Asset, distribution of - Whether telecom spectrum is a natural resource and Government is holding same as cestui que trust and same would not be available to use without payment of requisite dues - Held, yes - Whether spectrum, being intangible asset of Licensee/TSPs/Telcos/corporate debtor, can be subjected to insolvency/liquidation proceedings - Held, yes - Whether dues of Central Government/DOT under Licence fall within ambit of operational dues under I&B Code - Held, yes - Whether deferred/ default payment instalments of spectrum acquisition cost also fall within ambit of operational dues under I&B Code - Held, yes - Whether triggering of corporate insolvency resolution proceedings under I&B Code by corporate debtor with object of wiping off of such dues, not being for insolvency resolution, but with malicious or fraudulent intention, would be impermissible - Held, yes - Whether under section 18, Interim Resolution Professional is bound to monitor assets of corporate debtor and manage its operations, take control and custody of assets over which corporate debtor has ownership rights including intangible assets, which includes right to use spectrum - Held, yes - Whether spectrum cannot be utilized without payment of requisite dues which cannot be wiped off by triggering CIRP under I&B Code - Held, yes - Whether defaulting Licensees/Telcos cannot be permitted to wriggle out of their liabilities by resorting to triggering of CIRP by seeking initiation of CIRP under section 10, not for purposes of resolution but fraudulently and with malicious intent of withholding huge arrears payable to Government, obtaining moratorium to abort Government's move to suspend, revoke or terminate Licences and in event of a resolution plan being approved, subjecting Central Government to be with offered to it as 'operational creditor' within ambit of distribution mechanism contemplated under section 53 - Held, yes (Para 75)

FACTS

- The Supreme Court *vide* judgment dated 24-10-2019, '*Union of India v. Association of Unified Telecom Service Providers of India*' (2019) 110

taxmann.com 457 and other Civil Appeals dealt with the definition of 'AGR' and dues to be paid thereunder.

- The appeals came to be filed by Union of India seeking extension of time to make the payment as it was pointed out that several Telecom Service Providers (TSPs) were under insolvency proceedings. Order dated 20-7-2020 came to be passed by the Apex Court wherein the Apex Court observed that under the guise of reassessment and recalculation attempts were being made to wriggle out of the liability in terms of the judgment which was impermissible.

- The Apex Court observed that no dispute could be raised with respect to dues which have to be paid and a new round of litigation would be prohibited. The Apex Court, noticed that before the initiation of insolvency proceedings, most of the Telecom Service Providers, who were undergoing insolvency proceedings had applied to the DOT to grant permission for trading of license which came to be resisted by the Central Government. The permission was declined. There were huge outstanding arrears concerning the spectrum license, payment whereof was a pre-condition for grant of such permission. The Apex Court took note of various sharing arrangements made *inter se* Telecom Service Providers with respect to the spectrum. It also noticed the stand taken by DOT that the spectrum cannot be the subject matter of the I&B Code proceedings in view of provisions of sections 14 and 18. The Apex Court, after noticing the stand taken by Telecom Service Providers that the Corporate Insolvency Resolution Process (CIRP) Proceedings had been triggered *bona fide* proceeded to examine the limited question in proceedings before it whether the proceedings have been resorted to as a subterfuge to avoid payment of AGR dues and it was for the NCLT to decide whether the license/spectrum can be transferred and be a part of resolution process initiated under I&B Code.

- The Apex Court took note of the statutory guidelines issued by DOT in 2015 whereunder spectrum sharing allows the operators to pool their respective spectrum for usage in a specific geographical area. It noticed that the Central Government had framed Spectrum Sharing Guidelines on 24-9-2015 whereunder the spectrum trading allows the parties to transfer their rights and obligations to another party. In case of Spectrum Sharing, the right to use spectrum remained with the respective Telecom Service Providers whereas in case of Spectrum Trading the right to use gets transferred from the buyer to the seller. It noticed the transactions under the Guidelines for Access Spectrum Trading. While dealing with the aspect of payment of AGR dues by the TSPs it noticed the stand

of Union of India which, on the representation of TSPs and Indian Banks Association had decided to provide the facility of making payment in instalments within twenty years. The Apex Court raised three questions for its consideration.

- The three questions were whether spectrum can be subjected to proceedings under the Code; in the case of sharing, how the payment was to made by the Telecom Service Provider (for short, 'TSP'); and in the case of trading, how the liability of the seller and buyer was to be determined.
- The Supreme Court directed that it considered it appropriate that the questions should first be considered by the NCLT and order be passed by it.
- The Resolution Plans of resolution applicants had been approved by the NCLT under section 31 of the Insolvency and Bankruptcy Code, 2016 and an appeal had already been filed against the approval order by the Department of Telecommunications (DOT) before the Appellate Tribunal, the Supreme Court modified the directions given in its judgment that the NCLAT was to be directed to consider the various questions framed and pass a reasoned order.

HELD

Whether spectrum is a natural resource and Government is holding the same as cestui que trust.

- The question whether spectrum is a natural resource is no more *res integra*. Respondents have not raised any controversy in regard to spectrum being a natural resource, it being property of the public vested in the State as a Trustee and same being always used in the interests of the country. None of the contesting parties disputed the proposition that the actions of the State in relation to the spectrum are to be guided by public interest and public good. The right to use of spectrum is granted by DOT to Telecom Service Providers through licence in lieu of consideration which partakes of the character of a contract governing relations between the Licensor and Licensee with terms and conditions of licence regulating the right to use spectrum by the Licensee for the period of licence. It, however, remains to be seen whether upon parting of the right to use spectrum by DOT by way of grant of licence to TSPs, such right vests in the Licensee as an asset and if so, what is the nature of the asset and whether the same is capable of being transferred/traded irrespective of breach of terms of licence. (Para 52)
- Respondents have not asserted title to spectrum itself. They only claim to be owners of the right to use spectrum which is stated to have been parted with by the Government in their favour on payment of consideration for a specific period of time. The case

set-up by the TSPs is that they can be said to be owners *qua* the right to use spectrum which right accrues to them under the licence granted to them by the DOT. It is not in controversy that auctions were held by Government in which TSPs including Aircel Entities participated and emerging as successful bidders obtained the right to use spectrum in lieu of consideration. This emerges from the terms of Licence Agreement/ UASL dated 5-12-2006 executed *inter se* DOT and Aircel Ltd. which serves as model licence agreement for all. A bare look at the licence agreement for Unified Access Services (UAS) would reveal that the DOT - the Licensor enjoying privilege to grant licence in terms of provisions of section 4 of the Indian Telegraph Act, 1885 agreed to grant licence to provide UAS in Andhra Pradesh as per terms and conditions described in the schedule appended thereto. The grant of licence was made on the request of Aircel Ltd. - the Licensee for providing UAS in the Andhra Pradesh service area. The licence came to be granted in lieu of consideration of licence fee and due performance of the terms and conditions enumerated in the Licence Agreement on the part of Licensee on a non-exclusive basis to set-up and operate the UAS in the licensed service area. The licence was agreed to remain valid for twenty years from the effective date unless revoked earlier for any reason whatsoever. The Licensee agreed and unequivocally undertook to fully comply with all terms and conditions stipulated in the Licence Agreement. The period of licence was to commence from the effective date *viz.* 5-12-2006. The licence Agreement specifically provided that additional licences maybe issued to the Licensee's service area without any restriction of number of operators. A peep into the terms and conditions of the Licence Agreement would reveal that the Licensee was not entitled to assign or transfer the licence to a third party or enter into any agreement for sub-licence or partnership relating to any subject matter of the licence to any third party without the prior written consent of the Licensor. It is manifestly clear that sub-leasing/ partnership/creation of third party interest was prohibited. (Para 53)

- A holistic view taken after a bare look at the provisions and terms and conditions of the Licence Agreement lays bare that the Licensor continues to exercise control over the subject of Licence Agreement notwithstanding the licence having been granted to Licensee for providing UAS in the licensed services area for a period of twenty years in lieu of consideration *viz.* payment of licence fee. The terms and conditions governing the grant of licence and the power vested with the DOT - Licensor to

withhold consent for assignment or transfer of licence by the Licensee in any manner whatsoever to a third party or sub-lease, enter into partnership or create third party interest coupled with the fact that the Licensee is bound to furnish all required documents, accounts and information to the Licensor/TRAI and refrain from providing services to any TSP whose licence has been terminated or suspended or is not in operation, superadded to it the fact that the Licensor may in public interest or in the interest of security of the State or for the proper conduct of the telegraph suspend the operation of the licence or terminate the licence by written notice of 60 days for breach of any conditions of licence in regard to performing of any obligations under the licence including timely payments of fee and other charges due to the Licensor as also in the event of Licensee going into liquidation or ordered to be wound, up leaves no room for doubt that the Licensee enjoys a limited right of use of spectrum even after obtaining right to use for a fixed period and in lieu of payment of licence fee. The effective control lies in the hands of Licensor, who for breach of terms of the licence and failure on the part of Licensee to perform its obligations or for the reason that the Licensee goes into liquidation or is ordered to be wound up and also in the event the TRAI recommending termination of licence for non-compliance of its terms and conditions, can suspend, revoke or terminate licence. It is abundantly clear that the affairs of Licensee and the subject of licence is regulated by the Licensor and the Licensee has a limited right of use of spectrum which, apart from conditions of licence, is regulated by the provisions of Indian Telegraph Act and TRAI Regulations. In the face of the terms and conditions of agreement, ascribing a role to the Licensor only commensurate with its exercise of rights as absolute owner exercising effective and meaningful control over the affairs of the Licensee *qua* the subject matter of licence, it needs to be examined whether the spectrum granted under the Licence Agreement is a tangible asset of Licensee *qua* which CIRP could be initiated at the instance of Corporate Debtor notwithstanding the fact that it had defaulted in payment of licence fee and failed to perform its obligations under the Licence Agreement. (Para 54)

- Section 18 of I&B Code enjoins upon the Interim Resolution Professional (IRP) to collect all information, *inter alia*, related to the assets of the corporate debtor for determining the financial position of the corporate debtor. Section 18(1)(*f*) mandates that the IRP shall take control and custody of any asset over which the corporate debtor has ownership rights as recorded in balance sheet of the corporate debtor or with information utility

etc. that records the ownership of assets including intangible assets which include intellectual property. Section 25 of I&B Code dealing with duties of Resolution Professional *inter alia* provides that the Resolution Professional shall take immediate custody and control of all the assets of the Corporate Debtor including the business records of corporate debtor. Assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment have been excluded from the purview of assets which the Interim Resolution Professional is required to take in his control and custody. (Para 55)

- The million dollar question is whether limited right to use of spectrum vested with the Licensee for the licence period would constitute assets of Licensee. (Para 56)

- The material relied upon by Respondent No. 1 leads to one and the only irresistible conclusion that spectrum under the Licence Agreement between DOT and the Licensee TSPs is an asset being a valuable thing and same has been treated so and reflected as intangible asset in the balance sheet of the Licensee. The Company had participated in the auction held by DOT and obtained additional spectrum in Tamil Nadu Circle which was put to use. It records that the Company has categorized the spectrum fees as an `intangible asset'. This is besides acquisition of some SAP upgradation software which has been disclosed under `intangible assets under development'. This would lead to conclusion that while acquisition of SAP upgradation software was shown as intangible asset, the use of additional spectrum acquired in Tamil Nadu Circle through auction held by DOT was reflected by the Company as intangible asset. Thus, for duration of licence spectrum is shown as the assets of user. Section 4 of the Indian Telegraph Act, 1885 dealing with establishing, maintaining and working of telegraphs provides that within India the Central Government shall have the exclusive privilege of establishing, maintaining and working telegraphs. It is manifestly clear that the Central Government has the exclusive right of establishing, maintaining and operating the telegraph. The proviso to section 4 empowers the Central Government to grant a licence on such conditions and in consideration of such payments as it thinks fit to any person to establish, maintain and work a telegraph within any part of India. The second proviso empowers the Central Government to permit establishment, maintenance and working of wireless telegraphs on ships, aircraft or of telegraph other than wireless telegraph within any part of India in accordance with the rules made under the Act and subject to such restrictions and conditions as it thinks fit to be

imposed. The explanation makes it clear that for determination of payment for grant of a licence, the sum attributable to the universal service obligation maybe determined by it after considering recommendation of TRAI. The Central Government is further empowered to delegate all or any of its powers under the proviso to the Telegraph Authority subject to such restrictions and conditions as it may impose. Section 20A provides that if the holder of a licence granted under section 4 of the Indian Telegraph Act, 1885 contravenes any condition contained in his licence, he shall be punished with fine of a specified amount with further fine for every week during which the breach of condition continues. This further goes to show that the Licensor not only retains the power to suspend, revoke or terminate the licence for breach of its terms but also can levy penalty in the nature of fine for the breach and enhanced penalty (fine) for continued breach. The expression telegraph, as defined in section 3(1Aa) of the Act means any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, visual or other electro-magnetic emissions, radio waves or hertzian waves, galvanic, electric or magnetic means. The explanation clarifies that radio waves or hertzian waves would mean electro-magnetic waves of frequencies lower than 3000 giga cycles per second propagated in space without artificial guide. A bare look at this definition unmistakably shows that besides the hardware in the form of appliances, instruments, material or apparatus used or being capable of used for transmission or reception of signals etc. by wire, visual or other electro-magnetic emissions, electro-magnetic waves of frequencies lower than 3000 giga cycles per second are included within the definition of telegraph. Appliances etc. are the hardware used for transmission of the radio or hertzian waves, the later being the spectrum covering the frequencies of permissible range which is incapable of being perceived, touched or stored. While there is no difficulty in holding that the apparatus, instruments, appliances or other material used for transmission of signals etc., being material objects, fall within the purview of tangible assets, it is to be determined whether spectrum or its use would embrace the concept of intangible assets which constitutes a primary asset of Telecom Operator. (Para 57)

- The consultation paper on auction of spectrum dated 7-3-2012 prepared by the TRAI incorporates the decisions of the Government. A cursory look at this consultation paper would reveal that pursuant to the judgment of Apex Court in *Center for Public Interest Litigation*

v. *Union of India* (2012) 3 SCC 1, Government decided that in future the spectrum will not be bundled with the licence. The licence to be issued to Telecom Operators will be in nature of `unified licence' and the licence holder will be free to offer any of the multifarious telecom services. If the licence holder would like to offer wireless services, it will have to obtain spectrum through a market driven process. On the aspect of 3G spectrum and DWA services being allowed to trade, the licence, spectrum fee paid by the Licensees, in terms of the consultation paper, is considered as an intangible asset in the books of the licensee's. It is suggested that TRAI may initiate a consultation process with RBI for treating the spectrum fees as a tangible asset for the purpose of lending by Banks. The licence/spectrum fee paid by the Licensees is treated as `intangible assets' as per RBI instructions, thus, the spectrum being treated as a primary asset of Telecom Operator to implement its business. The suggestion to treat spectrum fee as a `tangible asset' for purpose of lending by banks appears to have been made by RBI to overcome reluctance on the part of Lenders to fund business plans considering the unsecured nature of lending as spectrum fee being paid by the Licensees was treated as `intangible assets' in the books of the Licensee's. The loans provided by the Banks for roll out of business plan had to be treated as unsecured loans. The statement of gross block, depreciation and net block - service forms part of the Guidelines for the Reporting System of Accounting Separation Regulations, 2016 which treats right to use spectrum/auction money for spectrum and licence fee/one time entry fee as `intangible assets' of the Company. Indian Accounting Standard (Ind AS) 38 deals with the standard applied in accounting for intangible assets other than financial assets or intangible assets falling within the scope of another standard. Amortization has been defined as the systematic allocation of the depreciable amount of an intangible asset over its useful life. It is provided that an intangible asset must be identifiable to distinguish it from goodwill. An asset is defined as being identifiable if it either is separable from the entity and sold, transferred, licensed, rented or exchanged either individually or together with a related contract asset or liability or arises from contractual or other legal rights irrespective of such rights being separable from the entity. It is stated that an intangible asset shall be recognized if, and only if, it is probable that the expected future economic benefits attributable to the asset will flow to the entity and the cost of the asset can be measured reliably. (Para 58)

- `Asset' is defined as a present economic resource controlled by the entity as a result of past events.

An economic resource is a right that has the potential to produce economic benefits. Going by this definition, it is unambiguously clear that if as a result of past events a present economic resource is controlled by the entity clothing it with a right that has potential of generating income, it falls within the purview of an 'asset'. It is clear that on account of licence creating a right of use of spectrum in favour of the Licensee for a period of twenty years, the Licence Agreement executed in the past gives a recurring right to present economic resource in the hands of Licensee to generate income thereby bringing the same within the fold of Licensee's asset. (Para 59)

- Guidelines for Trading of Access Spectrum by Access Service Providers issued by DOT on 12-10-2015 is a sequel to the recommendations of TRAI on spectrum trading which were made in pursuance of National Telecom Policy to move towards liberalization of spectrum to enable use of spectrum in any band to provide any service in any technology as also to permit spectrum pooling, sharing and later trading to enable optimal utilization of spectrum through appropriate regulatory framework. The Guidelines for Trading of Access Spectrum provide for spectrum trading being allowed only between two Access Service Providers holding *inter alia* UASL licence in a licensed area. It further provides that all access spectrum bands earmarked for access services by the Licensor will be treated as tradable spectrum bands. The Access Service Provider transferring the right to use spectrum would be known as 'Seller' and the Access Service Provider acquiring the right to use spectrum would be known as 'Buyer'. It further provides that only outright transfer of right to use the spectrum shall be permitted. Leasing of spectrum is not permitted. It also specifies the block sizes (band-wise) for which spectrum trading shall be permitted. It is significant to take note of the provision in the Guidelines that only that spectrum is permissible to be traded which has either been assigned through an auction in the year 2010 or afterwards or on which the Telecom Service Provider has already paid the prescribed market price. In such case, entire spectrum would be tradable. It also provides that both licensees trading the spectrum shall jointly give prior intimation for trading the right to use spectrum at least 45 days before the proposed effective date of the trading to DOT. They are also required to furnish undertaking regarding compliance with terms and conditions of the spectrum trading. A mere glance at the Guidelines for Trading of Access Spectrum by Access Service Providers would reveal that the trading of access spectrum is a step taken under the National Telecom Policy which envisaged a

swift move towards liberalization of spectrum for providing any service in any technology and achieving the object of optimal utilization of spectrum with regulations adopted for innovation, better services made available to consumers at cheaper tariffs with options being available. The policy envisaged permitting of spectrum pooling, sharing and subsequent trading for optimum utilization of spectrum to facilitate ease of doing business by allowing free play in the commercial decisions. The trading of access spectrum by Access Service Providers being based on recommendations of TRAI on spectrum trading and in pursuance of National Telecom Policy providing the status of Seller to the Access Service Provider transferring the right to use spectrum with corresponding status of Buyer to the Access Service Provider acquiring the right to use spectrum is only compatible with the hypothesis that the Access Service Provider/Licensee has the capacity and is possessed of right to transfer the right to use the spectrum that had been acquired by it under the Licence. So long as the licence is not suspended, revoked or terminated or until the expiration of period of licence, the Access Service Provider/Licensee continues to have right to trade subject to observance of the Spectrum Trading Guidelines and terms and conditions of the regulatory framework. The trading activity envisaged under the Guidelines is subject to approval of DOT which has the right to recover the dues for the period prior to the effective date of trade. It is a trading of limited nature with the trading being permitted only between companies eligible to trade and the Buyer satisfying the eligibility criteria. (Para 60)

- The Tripartite Agreement is executed *inter se* the Licensor, the Licensee and the Lender, in terms whereof the Licensor agreed to transfer or assign the licence by endorsement thereon in favour of the Selectee selected by the Lenders. Perusal of the stipulations in the Tripartite Agreement would further lay bare that the decision of Licensor in selection of Selectee shall be final and binding on the Licensee and the Lender. It further emerges that all actions of Lender pursuant to the Agreement shall be for the benefit of Lenders and if the Licensor decides to transfer the licence to any person other than the Selectee, it shall take into account the Lenders dues as well as the Licensors dues while inviting bids from the prospective transferees. However, the Lenders are not entitled to operate the service under licence themselves as a Licensee. The agreement appears to have been worked out to facilitate the financing of the project to be set up by the Licensee pursuant to the licence and provide for transfer/assignment of licence to protect and secure the Lenders interest arising out

of grant of financial assistance to the Licensee. Article 2 of the Tripartite Agreement provides for transfer or assignment of licence as security for financial assistance. Under article 2.1 Licensor agrees to transfer or assign the licence by endorsement thereon in favour of the Selectee selected by the Lenders and proposed to the Licensor for purpose of assignment/ transfer of licence. In the event of a default, the agent (a Financial Creditor acting for itself and as agent for other members of a consortium of Lenders who agreed to provide financial assistance to the Licensee for a project) shall notify the Licensee and the Licensor about such default and require the Licensee to remedy the same within 30 days from the date of notice which shall be conclusive evidence of the event of default. Upon such default and failure of Licensee to remedy the default, the Lenders may invite, negotiate and procure offers or tenders for the takeover and transfer of the project together with all the assets pertaining to the project of the Licensee including the license to the Selectee. This leaves no room for doubt that the license is treated as a tradable asset and such transfer/assignment of licence is executed with the Lenders financing the project set-up by the Licensee to protect and secure Lender's interest arising out of grant of financial assistance. The Lenders, in the event of default and failure of Licensee to remedy the default despite service of notice, can exercise their right of initiating steps for takeover and transfer of the project together with all the assets pertaining to the project of the Licensee including the licence to the Selectee upon such Selectee's assumption of the liabilities and obligations of the Licensee towards the Licensor. Even article 3.4 takes care of the interests of the Lenders while providing that in the event of Licensor deciding to transfer the licence to any person other than the Selectee, it shall take into account the Lender's dues as well as the Licensor's dues while inviting bids from the prospective transferees. Article 3.5 is specific to provide for a situation where a Selectee is not found. In such situation the Licence Agreement shall stand terminated and the assets/infrastructure of defaulting Licensee shall be disposed off with Licensor having the first charge/ right/precedence from proceeds of such disposal. Remainder, if any, shall go to offset the dues of Lenders to the extent possible and any balance left would go to defaulting licensee. These provisions read as a whole, lead to the irresistible conclusion that in terms of Tripartite Agreement the interests of the Lender are secured by creation of security interest in its favour which includes takeover and transfer of the project together with all the assets pertaining to the project including the licence to the Selectee. DOT is a party to the

Tripartite Agreement and it cannot shrug off its shoulders in claiming that the Tripartite Agreement was in the nature of binding agreement only between the Licensee and the Lender with no obligations created for it to perform. DOT is a constituent and a party to the Tripartite Agreement which provides for transfer/assignment of licence by the Licensee in favour of the Selectee of the Lenders with the consent and approval of DOT. It is flabbergasting to hear DOT advancing the proposition that use of spectrum in terms of the licence does not constitute the assets of the Licensee and that the licence granted to Licensee and use of spectrum thereunder is not a tradable asset. In the face of provisions of Tripartite Agreement read in juxtaposition with the Guidelines for Trading of Access Spectrum, it is inconceivable that DOT as Licensor is not aware of the import of the provisions and the effect of the stipulations in the Tripartite Agreement and the Guidelines for Trading of Access Spectrum based on National Telecom Policy and formulated by Central Government on the recommendations of TRAI. Presence of DOT in the Tripartite Agreement is neither cosmetic nor an idol formality. The combined effect of all this is that the DOT has taken a stand which is in direct conflict with the factual proposition emanating from record and the role it has played all along. The argument raised on the score that the use of spectrum under the licence granted to it is not an intangible asset in the hands of Licensee being devoid of merit has to be repelled. (Para 61)

- It having been found that the Telecom Licence and right to use spectrum are assets of the Licensee/ corporate debtor falling within the purview of sections 18 and 25 of the I&B Code for purposes of control and custody in the hands of Interim Resolution Professional/ Resolution Professional during CIRP Proceedings, be it seen that the Telecom Licences and right to use spectrum being assets of the corporate debtor are covered under moratorium slapped under section 14 of the I&B Code as a sequel to the admission of an application seeking triggering of the CIRP. *Explanation* to section 14(1) and sub-section (2A) introduced in section 14 in clear and unambiguous terms provide that the licences and concessions issued by the Government Authorities cannot be terminated or suspended during CIRP so long as the current dues were being paid, which has the object of ensuring maintenance of the substratum of the business during the CIRP period and keeping the corporate debtor as a going concern. The protection has been granted to telecom licences and right to use spectrum being assets of the corporate debtor and the slapping of moratorium prohibits the

Owner/Lessor during CIRP period from recovering property occupied or possessed by the corporate debtor. This protection is only limited to moratorium period and obtains only on the condition of there being no default in payment of current dues. (Para 62)

- Under section 14(1)(*d*), the Adjudicating Authority is empowered to declare moratorium for prohibiting the recovery of any property by an owner or Lessor where such property is occupied by or in the possession of the corporate debtor. In this regard, preservation of the corporate debtor as a going concern during continuation of CIRP being of primary importance as the Appellant was the sole purchaser of power from corporate debtor under Power Purchase Agreement, the termination of which on account of triggering of CIRP would result in corporate death.

- The earlier judgments dealing with the scope of section 14(1)(*d*) would be of little value after introduction of explanation by Act (1 of 2020) enforced from 28-12-2019 which has a *non-obstante* clause giving an overriding effect to it. The explanation is clarificatory in nature and provides in unambiguous terms that a licence, permit, registration, quota, concession, clearances or similar grant or right given by Central Government, State Government, Local Authority, Sectoral Regulator or any other authority shall not be suspended or terminated on the ground of insolvency. The only condition is that such protection against suspension or termination of licence or permit or concession, as the case may be, is that there should be no default in payment of current dues relatable to use or continuation of such licence etc. during the moratorium period. After introduction of this explanation, which is attracted in the instant case, the statutory protection against suspension or termination of licence would extend to the corporate debtor as the Central Government through DOT is the Licensor. Of course it is a contractual relationship but that does not depart from the fact that the Central Government is the Licensor and in that capacity it is covered under the explanation. In conclusion, it can be said without any fear of contradiction that in the event of spectrum being subjected to proceedings under I&B Code, protection would be available to Telecom Licences and spectrum under section 14(1). (Para 63)

- It has also been found that in terms of the Licence Agreement and Guidelines for Access Trading of Spectrum for Access Service Providers, the right to use of spectrum vests in the TSPs/ Licensees. Possession is correlated to ownership and entitlement to possession cannot be divorced from the title to property. Spectrum being the property of Nation is in possession of the State as a Trustee,

however, right to use spectrum under the Licence Agreement vests in the Licensees/TSPs, who are in occupation of the same being its actual users irrespective of whether they have a right to hold the same in their possession or not. Bulk of case law cited at the Bar in regard to concept of possession and occupation is of little relevance in instant case as the spectrum being a natural resource belonging to the Nation with State holding it in trust for the benefit of the Nation is not in controversy. It is also not disputed that as owner in possession of the spectrum of defined frequencies allocated to the Nation under International Norms, it is only the right of user that is granted to the Licensees/ TSPs under licence permitting it to use the spectrum of specified frequencies for consideration. In the instant case, in terms of the Licence Agreement, provisions whereof have been adverted to elsewhere in this judgment, the Licensees/TSPs have been granted right of use of spectrum of specified frequencies in the particular telecom service area for twenty years with renewal clause which leads to the conclusion that the right to use of spectrum would be in occupation of the Licensees/ TSPs or the Assignees/Transferees in terms of the Tripartite Agreement. It being the duty of the IRP to collect all information relating, *inter alia*, to the assets of the corporate debtor for determining its financial position, monitor its assets and manage its operations until Resolution Professional is appointed by Committee of Creditors (CoC) and take control and custody of assets over which the corporate debtor has ownership rights as recorded in the balance sheet of corporate debtor with such assets including intangible assets falling within the purview of section 18 of I&B Code, there should be no hesitation in holding that the right to use of spectrum under the Licence Agreement or falling within the ambit of Tripartite Agreement can be subjected to proceedings under section 18 of I&B Code. Therefore, one need not go into the question of distinction between possession and occupation. The plethora of judgments cited on the issue are irrelevant for purposes of disposal of this matter. (Para 64)

- Based on National Telecom Policy and upon consideration of recommendations of TRAI on spectrum trading the Government decided to allow trading of access spectrum only between two Access Service Providers holding *inter alia* UASL with authorization of Access Service in the licensed service area with the earmarked spectrum bands treated as tradable spectrum bands. It is noticed that only transfer of right to use of spectrum *inter se* Seller and Buyer shall be permitted while lease of spectrum would be impermissible. Such trading between the two Licensees would have to give 45 days prior intimation

for trading the right to use the spectrum to DOT. (Para 65)

- A glance at Guidelines for Access Spectrum Trading for Access Service Providers would reveal that the Government has reserved to itself the right to take appropriate action in the event of undertakings given by the Seller and Buyer in regard to terms and conditions of guidelines for spectrum trading and the licence conditions not being in conformity with such guidelines and the conditions in licence at the time of giving intimation. Such appropriate action may include annulment of the trading arrangement. This provision contained in guideline 10 protects the right of the Government as Licensor and as Authority competent to allow trading of access spectrum which is regulated by the guidelines. It clearly implies that if the Seller, Buyer or both, while giving prior intimation for trading have either provided false information, suppressed a material fact or provided incorrect information in regard to the proposed trading being in conformity with the conditions of licence and the Spectrum Trading Guidelines, the Government would be within its rights to take appropriate action including annulment of trading arrangement. (Para 66)

- Guideline 11 makes it imperative for the Seller to clear the outstanding dues prior to concluding the spectrum trading agreement whereafter it shall be the liability of Buyer to clear any dues recoverable upto the effective date of trade. This guidelines further vests discretion in the Government to recover any amount found recoverable subsequent to the effective date of trade hitherto unknown to the parties, from the Buyer or Seller, jointly or severally. (Para 67)

- A combined reading of these two guidelines in conjunction with the terms and conditions of the Licence Agreement would lay bare that the entire control vests with the Licensor *i.e.* DOT and the Licensee would not be competent to assign or transfer the Licence without prior written consent of the Licensor. Though the licence is valid for a period of twenty years from the effective date, the Licensor has reserved unto itself the right to revoke the licence for any reasons whatsoever. Further the licence can be suspended if public interest or interest of security of State or proper conduct of telegraph so warrants. That apart, the licence can be terminated by a written notice of 60 days in situations including failure to perform obligations under the licence which include timely payment of fee and other charges due to the Licensor. Trading in spectrum is clearly subject to the Seller having a valid and subsisting right as licensee competent to trade under the Spectrum Trading Guidelines with the prior consent of the DOT. If the Licensee has assigned

or transferred the licence by way of sub-leasing/partnership/creation of third party interest without the prior written consent of Licensor or the transferee/assignee is not fully eligible, transfer of licence and trading of spectrum shall not be valid. The Licensee may transfer or assign the Licence Agreement with prior written approval of the Licensor on fulfilment of conditions which *inter alia* include the condition that all the past dues are fully paid till the date of transfer/assignment by the Transferor company and the Transferee company undertakes to pay future dues inclusive of anything remaining outstanding against the outgoing company for the past period. Thus, there is an embargo on the Licensee to transfer or assign the licence where past dues are not fully paid till the transfer/assignment by the Licensee is made with prior written approval of the Licensor. Such prior written approval is contemplated to be granted by the Licensor only on fulfilment of conditions which include clearance of past dues by the Licensee. Clause 6.3 of Licence Agreement further postulates that where such transfer or assignment is requested in furtherance of the Tripartite Agreement already executed amongst Licensor, Licensee and Lenders, prior written approval of the Licensor shall be granted only on fulfilment of procedures of Tripartite Agreement. Restrictions on transfer of licence imposed under clause 6 of the Licence Agreement read in juxtaposition with Guidelines 10 and 11 of the Guidelines for Trading of Access Spectrum by Access Service Providers would lead to the conclusion that where the approval of the Licensor for transfer or assignment of the Licence Agreement and trading of access spectrum has been obtained on the basis of undertakings furnished by the Transferor Licensee/Seller and the Transferee Licensee/Buyer which were not in conformance with the terms of the Guidelines for Spectrum Trading or/and of the Licence at the time of giving intimation for trading of right to use the spectrum, the Government has the right to take appropriate action including annulment of trading arrangement. Same holds true in respect of the Transferor/Seller who is in default in respect of dues prior to concluding any agreement for spectrum trading. It is therefore lucidly clear that the Transferor Licensee has the obligation to clear all its dues prior to concluding any agreement for spectrum trading and both the Licensees (Seller and Buyer) are required to give an undertaking that they are in compliance with the terms and conditions of the Guidelines for Spectrum Trading. Guideline 10 vests discretion in the Government to take appropriate action including annulment of trading arrangement, if there is no compliance with all the terms and conditions of the Guidelines for Spectrum Trading

even if such fact is discovered at a subsequent stage. In view of the same, there should be no difficulty in holding that while a licence can be transferred as an intangible asset of the Licensee/corporate debtor under Insolvency Proceedings in ordinary circumstances, however as the trading is subjected to clearance of dues by Seller or Buyer, as the case may be, in terms of Guidelines 10 and 11 of the Guidelines for Access Spectrum Trading for Access Service Providers, the Transferor/Seller or Transferee/ Buyer being in default, would not qualify for transfer of licence under the insolvency proceedings. (Para 68)

- As regards, Guideline 12, it is deducible from the plain language of this Guideline that in the event of spectrum being the subject of dispute in any pending litigation before a court of law, the Seller would be under an obligation to ensure that the rights and liabilities are transferred to the Buyer in accordance with the legal procedure and the transfer of spectrum would be permitted only after securing the interests of the Licensor. The provision covered by this guideline pertains to the spectrum being the subject of controversy before a court competent to adjudicate on the issue and not an insolvency proceeding. The object of the provision is to ensure transfer/ trading of spectrum in conformance of Spectrum Trading Guidelines and permission for such transfer/ trading being subjected to securing of interest of Licensor. The issue regarding spectrum referred to in this guideline is in regard to a dispute which may be before a competent court for adjudication. The Adjudicating Authority (National Company Law Tribunal) is not a court of law competent to decide an issue in regard to trading of spectrum. This guideline is to be read as an extension of Guidelines 10 and 11 as it bears direct and proximate *nexus* with spectrum trading and clearance of dues by the Seller. This guideline cannot be read independently. The Spectrum Trading Guidelines cannot be substituted under the CIRP and the dues of the Licensor, which are required to be cleared by the Seller prior to concluding any agreement for spectrum trading in terms of Guideline 11, cannot be subjected to clearance by way of a provision in a Resolution Plan, moreso, when the Seller is in breach under contract *viz.* the Licence Agreement and a self-confessed defaulter who has triggered insolvency by taking recourse to section 10. (Para 69)

- Admittedly, Central Government objected to grant permission for trading of licence to the TelCos. before initiation of insolvency proceedings. It appears that *inter alia* Central Government declined permission for trading of licence as in its opinion spectrum cannot be subject matter of I&B Code

proceedings. It is not disputed that the TelCos. were faced with huge arrears concerning the spectrum licence which were required to be cleared before granting of such permission by Central Government. Since the DOT was of the view the spectrum could not be the subject matter of insolvency proceedings and the dues under the licence towards the spectrum use could not be put in the category of operational dues, it did not accept the sharing arrangements made *inter se* Telecom Service Providers with respect to spectrum. The issue for consideration would be whether spectrum can be treated as security interest and what was the mode of its enforcement. Admittedly, NOC for trading has been declined by the Government for non-compliance of the terms and conditions stipulated in the Licence Agreement. If the spectrum can be subjected to insolvency resolution proceedings, it is stated to have the effect of wiping off the dues of the Government accumulating to more than Rs. 40,000 Crores. In comparison thereto the liability of lenders is much less. This is not a case where a Financial Creditor or an Operational Creditor is seeking initiation of Corporate Insolvency Resolution Process against the corporate debtor but the corporate debtor itself is seeking such initiation. This would therefore, require to be examined alongwith the question whether such dues as are payable to Government can be wiped off by resorting to the proceedings under the I&B Code and whether insolvency proceedings are *bona fide*. (Para 70)

- A conclusion has been reached elsewhere in this judgment that the Licence Agreement is in the nature of a contractual arrangement between the Central Government and the TSPs (Licensee). This position is recognized by the Apex Court in *Union of India* v. *Association of Unified Telecom Service Providers of India* (2011) 10 SCC 543. It is already held that the right to use spectrum is an intangible asset of the Licensee and can be subjected to insolvency proceedings. It is indisputable that the assets of the corporate debtor including the intangible assets can be subjected to insolvency/ liquidation proceedings. Since right to use spectrum, is an intangible asset in the hands of Corporate debtor/Licensee though the spectrum, is not the property of the Corporate debtor/Licensee and it being the admitted case of the Corporate debtor/Licensee in *Union of India* v. *Association of Unified Telecom Service Providers of India etc.* (2020) 119 taxmann.com 26 (AGR Judgment decided on 1st September, 2020) before the Apex Court that the Licensees/ TelCos used the spectrum without paying for it which could have been rectified by paying the AGR dues, there should be no hesitation in holding that the spectrum cannot be utilized without payment of

requisite dues which cannot be wiped off by triggering CIRP under I&B Code. The Licensees, in terms of the judgment of Apex Court in *Center for Public Interest Litigation* (*supra*), holding the right to use spectrum in trust have to use it for the benefit of public at large and not for private or self interest. It is indisputable that the Licensees/ TelCos are the self-confessed defaulters having contravened terms and conditions of Licence Agreement on account of non-payment of contractual dues towards use of spectrum causing huge pecuniary loss to the Nation besides being guilty of breach of trust but instead of rectifying the breach raised disputes of sorts to evade the huge outstanding payment. Having failed to get any respite from judicial apparatus, the defaulting Licensees/TelCos sought to wriggle out of their liabilities by resorting to triggering of CIRP by seeking initiation of CIRP under section 10 of I&B Code, not for purposes of resolution but fraudulently and with malicious intent of withholding the huge arrears payable to Government, obtaining moratorium to abort Government's move to suspend, revoke or terminate the Licences and in the event of a Resolution Plan being approved, subjecting the Central Government to be contented with the peanuts offered to it as 'Operational Creditor', if at all anything survives for the Operational Creditors within the ambit of distribution mechanism contemplated under section 53 of I&B Code. When a Company undergoes insolvency proceedings, the pre-CIRP dues including the statutory dues would have to be dealt with in terms of provisions of I&B Code under an approved Resolution Plan or in Liquidation, as the case may. Therefore, non-payment of full consideration would impact the right of the Licensor with the Licensee - corporate debtor continuing to enjoy the benefits under the Telecom Licence and also deriving pecuniary benefits from the right to use spectrum. The admitted claims *qua* the operational debts would have to be settled as the part of the approved Resolution Plan or in Liquidation, as the case may be. Operational Debt, as defined under section 5(21) of the I&B Code includes dues payable towards provision of goods and services and the dues payable to Government under any law for the time being in force which would include the dues of Licensor-DOT. Of course the interests of the Operational Creditor are statutorily protected under section 30(2)(*b*) of the I&B Code with the explanation emphasizing that the distribution shall be fair and equitable to the class of creditors taken care of by the provision. The 'Operational Creditors' are not accorded the same treatment as 'Financial Creditors'. Section 53 lays down a waterfall mechanism for distribution of proceeds from the sale of liquidation assets, dues

pertaining to Central Government under section 53(1)(e)(i), which rank below the Secured and Unsecured Financial Creditors.

- If CIRP mechanism is allowed to prevail, it would be immensely detrimental to and jeopardize the legitimate interests of the Central Government. It is of relevance to refer to the fact that the Adjudicating Authority, while dealing with the Resolution Plan of Successful Resolution Applicant *qua* the corporate debtor observed that 'the plan does not appear to be a resolution plan but appears to be a winding up, liquidation plan'. This observation appears to have been made after noticing that through the Resolution Plan the Resolution Applicant was planning to monetize most of the assets and continue only with a small portion of the business operations. The Adjudicating Authority in the given circumstances should have examined the *bona fide* of the Aircel Entities in initiating CIRP by filing applications under section 10 of the I&B Code which, on the face of it, aimed at monetizing most of the assets for meeting obligations of the Resolution Applicant towards the Banks which too would depend on when and how the spectrum would be sold, more so as the Aircel Entities had stopped operations before initiating insolvency proceedings and the spectrum continued to go waste and unutilized. (Para 71)

- As regards the nature of debt and the status of DOT, be it seen that apart from the dues payable to the Government, the consequence of parting of the privilege by Central Government in grant of licence to TelCos under the Telegraph Act, the dues payable to the Government would fall within the ambit of 'Operational Dues' thereby clothing the Central Government/Licensor with the status of an 'Operational Creditor'. That apart, the DOT itself has submitted its claim in 'Form-B' as an Operational Creditor during CIRP proceedings and attended the meetings of CoC where Resolution Plans were evaluated and approved. MCA had issued an Office Memorandum clarifying that the dues arising under the Indian Telegraph Act, 1885 or under the Licence Agreement would be in the nature of operational dues. In view of this admitted factual position, DOT cannot now make a U-turn and raise an issue in regard to nature of its dues styling the same as a 'Financial Debt'. DOT is estopped by its conduct from staging such U-turn. It also operates as estopple by record. Even otherwise, the payment of dues admissible to DOT is not in the nature of 'a debt disbursed against the consideration for the time value of money' within the meaning of 'Financial Debt' defined under section 5(8) of the I&B Code to designate it as a 'Financial Creditor'. (Para 72)

- Under section 4 of the Indian Telegraph Act, 1885, establishing,

maintaining and working of telegraphs is the exclusive privilege of the Central Government which may grant a licence on such conditions and in consideration of such payments as it thinks fit to any person to establish, maintain and work a telegraph within any part of India subject to such restrictions and conditions as it thinks fit to be imposed. The explanation makes it clear that for determination of payment for grant of a licence the sum attributable to the universal service obligation may be determined by it after considering recommendation of TRAI. Section 20A provides that if the holder of a licence granted under section 4 of the Indian Telegraph Act, 1885 contravenes any condition contained in his licence, he shall be punished with fine of a specified amount with further fine for every week during which the breach of condition continues. This shows that the Licensor not only retains the power to suspend, revoke or terminate the licence for breach of its terms but also can levy penalty in the nature of fine for the breach and enhanced penalty (fine) for continued breach. The grant of licence in lieu of consideration would be in the nature of dues payable to Government, thereby falling within the definition of 'Operational Dues'. Since under the Revenue Sharing Regime, the spectrum does not change hands and each of the TSPs will continue to make payment of AGR dues arising from the spectrum that each holds, the nature of dues will not change. Spectrum trading allows operators to pool their respective spectrum for usage which facilitates optimization of resources. Spectrum trading also allows better spectrum usage by transfer of spectrum rights and obligations to another party. In spectrum sharing, right to use spectrum remains with the TSP whereas in spectrum trading it gets transferred from the Seller to the Buyer. The difference between the two lies in volume of utilization of spectrum besides sharing the pool in case of spectrum sharing by the TSPs simultaneously whereas in spectrum trading the right to use gets transferred/assigned from Seller to Buyer. However, that does not change the nature of dues, which are payable to the Licenser. Such dues continue to be the 'Operational Dues' being payable primarily in terms of the Licence Agreement. (Para 73)

- For determination of the issue in regard to the spectrum being treated as security interest and mode of enforcement, be it seen that the relationship amongst the Licensor, the Licensee and the Lender are governed by the Tripartite Agreement which envisages priority to the dues of DOT over dues of other creditors, be they secured or unsecured creditors. The Lender has been permitted to cause assignment of Licence and change of Licensee

with permission of DOT on conditions including payment of dues owed to DOT. Such Tripartite Agreement cannot be overridden and nullified. Enforcement of security interest by the Lenders will be subject to compliance of terms and conditions of Tripartite Agreement which envisages satisfaction of Bank's claims only after settling the dues of DOT. Therefore having regard to clauses 3.4 and 3.5 of the Tripartite Agreement according priority/first charge to DOT, the spectrum cannot be treated as a security interest by the Lenders. That apart, it being within the domain of Licensor to suspend, revoke or terminate the Licence Agreement besides being empowered under section 20A of the Indian Telegraph Act, 1885 to levy fine for contravention of any condition contained in its licence, the security interest, if any, in the hands of Lenders would be so fragile and vulnerable that would seriously jeopardize its enforcement. (Para 74)

Conclusion

(*a*) Spectrum is a natural resource and the Government is holding the same as *cestui que trust*.

(*b*) Spectrum, being intangible asset of the Licensee/TSPs/TelCos/corporate debtor, can be subjected to insolvency/liquidation proceedings.

(*c*) Dues of Central Government/DOT under the Licence fall within the ambit of Operational Dues under I&B Code.

(*d*) Deferred/default payment instalments of spectrum acquisition cost also fall within the ambit of Operational Dues under I&B Code.

(*e*) As per Revenue Sharing Regime and the provisions of Indian Telegraph Act, 1885, the nature of dues payable to Licenser continues to be 'Operational Dues' which are payable primarily in terms of the Licence Agreement.

(*f*) Natural Resource would not be available to use without payment of requisite dues.

(*g*) Triggering of Corporate Insolvency Resolution Proceedings under I&B Code by the corporate debtor with the object of wiping off of such dues, not being for insolvency resolution, but with malicious or fraudulent intention, would be impermissible.

(*h*) TSPs have the right to use spectrum under licence granted to them. They cannot be said to be the owners in possession of the spectrum but only in occupation of the right to use spectrum. Ownership of spectrum belongs to Nation (people) with Government only being its Trustee. Possession correlates with the ownership right.

(*i*) Under Section 18, the Interim Resolution Professional is bound to monitor the assets of the corporate debtor and manage its operations, take control and custody of assets over which the corporate debtor has ownership rights including

intangible assets which includes right to use spectrum.

(*j*) Trading in intangible assets like use of spectrum derives strength from the terms and conditions of the Licence Agreement/UASL, clause 6.3 whereof vests in Licensee a right to transfer or assign the Licence Agreement with prior written approval of the Licensor and subject to fulfilment of conditions which include payment of past dues in the date of transfer. On the other hand, Insolvency Proceedings arise out of default in discharge of financial or operational debt and are triggered for insolvency resolution of corporate persons, etc. in a time bound manner for maximization of value of assets of such persons.

(*k*) While a licence can be transferred as an intangible asset of the Licensee/corporate debtor under Insolvency Proceedings in ordinary circumstances, however as the trading is subjected to clearance of dues by Seller or Buyer, as the case may be, the Transferor/Seller or Transferee/Buyer being in default, would not qualify for transfer of licence under the insolvency proceedings.

(*l*) The spectrum cannot be utilized without payment of requisite dues which cannot be wiped off by triggering CIRP under I&B Code.

(*m*) The defaulting Licensees/TelCos cannot be permitted to wriggle out of their liabilities by resorting to triggering of CIRP by seeking initiation of CIRP under section 10 of I&B Code, not for purposes of resolution but fraudulently and with malicious intent of withholding the huge arrears payable to Government, obtaining moratorium to abort Government's move to suspend, revoke or terminate the Licences and in the event of a Resolution Plan being approved, subjecting the Central Government to be contended with the peanuts offered to it as 'Operational Creditor' within the ambit of distribution mechanism contemplated under section 53 of I&B Code.

(*n*) Having regard to clauses 3.4 and 3.5 of the Tripartite Agreement according priority/first charge to DOT, the spectrum cannot be treated as a security interest by the Lenders. In view of this finding, the mode of Enforcement of security interest is not considered. (Para 75)

CASE REVIEW

Union of India v. *Association of Unified Telecom Service Providers of India* (2011) 10 SCC 543 (para 71); *Swiss Ribbons (P.) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 71) and *Committee of Creditors of Essar Steel Ltd.* v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC) (para 71) *followed*.

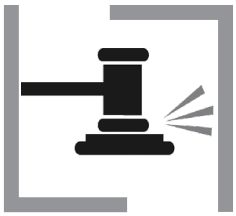
CASES REFERRED TO

Union of India v. *Association of Unified Telecom Service Providers of India etc.*

(2020) 119 taxmann.com 26 (SC) (para 1), *Union of India* v. *Association of Unified Telecom Service Providers of India* (2019) 110 taxmann.com 457 (SC) (para 6), *M.C. Mehta* v. *Kamal Nath* (1997) 1 SCC 388 (para 8), *Fomento Resorts and Hotels Ltd.* v. *Minguel Martins* (2009) 3 SCC 571 (para 8), *Center for Public Interest Litigation* v. *Union of India* (2012) 3 SCC 1 (para 8), *Association of Unified Telecom Services Providers* v. *Union of India* (2014) 6 SCC 110 (para 8), *Municipal Corporation of Greater Mumbai* v. *Abhilash Lal* (2019) 111 taxmann.com 405/(2020) 157 SCL 477 (SC) (para 14), *Swiss Ribbons (P.) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 15), *Union of India* v. *Association of Unified Telecom Providers of India* (2011) 10 SCC 543 (para 27), *B. Gangadhar* v. *B.G. Rajalingam* (1995) 5 SCC 238 (para 29), *Rajendra K. Bhatta* v. *Maharashtra Housing & Area Development Authority* (2020) 114 taxmann.com 655/160 SCL 95 (SC) (para 29), *Embassy Property Developments (P.) Ltd.* v. *State of Karnataka* (2019) 112 taxmann.com 56/(2020) 157 SCL 445 (SC) (para 32), *Ashwini Kumar Ghosh* v. *Arabinda Bose* AIR 1952 SC 369 (para 37), *Maharashtra State Co-operative Bank Ltd.* v. *Assistant Provident Fund Commissioner* AIR 2010 SC 868 (para 47), *Illinois Central Railload Company* v. *People of the State of Illinois* (1892) 146 U.S. 387 (SC) (para 52), *Gujarat Urja Vikas Nigam Ltd.* v. *Amit Gupta* (2021) 125 taxmann.com 150 (SC) (para 63) and *Committee of Creditors of Essar Steel India Ltd.* v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC) (para 71).

Amit Mahajan, CGSC, **Ms. Pooja Mahajan**, **Gitesh Chopra**, **Vidur Mohan**, **Kanu Agrawal** and **Ms. Shefali Munde**, Advs. *for the Appellant.* **Ravi Kadam**, **Abhinav Vashisht**, Sr. Advs., **Anoop Rawat** , **Ms. Charu Bansal**, **Ms. Ankita Mandal**, **Vaijayant Paliwal**, **Saurav Panda**, **Ms. Kriti Kalyani**, **Ms. Salonee Kulkarni**, **Dhruv Dewan**, **Ms. Harshita Choubey**, **Dhruv Sethi**, **Ms. Chandni Ghatak**, **Rohan Batra**, Advs., **Ramji Srinivasan**, Sr. Adv., **Raunak Dhillon**, **Aditya Marwah**, **Madhav Kanoria**, **Shubhankar Jain**, **Shivkrit Rai** and **Ms. Rajshree Chaudhary**, Advs. *for the Respondent.*

For Full Text of the Judgment see
(2021) 126 taxmann.com 147 (NCLAT - New Delhi)



(2021) 127 taxmann.com 875 (NCLAT- New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

AKJ Fincap Ltd. v. Bank of India

ANANT BIJAY SINGH, JUDICIAL MEMBER AND MS. SHREESHA MERLA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NOS. 178 & 179 OF 2021†

APRIL 16, 2021

Section 60, read with section 7 of the Insolvency and Bankruptcy Code, 2016 and rule 49 of the National Company Law Tribunal Rules, 2016 - Corporate person's Adjudicating Authorities - Adjudicating Authority - Whether Adjudicating Authority has power to set aside an ex-parte order, provided it is satisfied that there was sufficient cause with respect to service of notice as provided in rule 49(2) - Held, yes (Para 11)

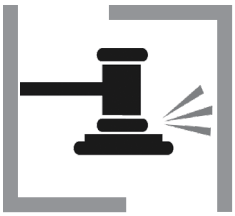
CASE REVIEW

AKJ Fincap Ltd. v. *Bank of India* (2021) 127 taxmann.com 874 (NCLT - Guwahati) *set aside* (***See Annex***).

Abhinav Hansaria, Adv. *for the Appellant.*
Nipun Dave and **Aditya Kumar**, Adv. *for the Respondent.*

† Arising out of order passed by NCLT, Guwahati Bench in AKJ Fincap Ltd. *v.* Bank of India (2021) 127 taxmann.com 874 (NCLT - Guwahati)

For Full Text of the Judgment see
(2021) 127 taxmann.com 875 (NCLAT - New Delhi)



(2021) 126 taxmann.com 210 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Directorate of Enforcement v. Manoj Kumar Agarwal

A.I.S. CHEEMA, JUDICIAL MEMBER AND DR. ALOK SRIVASTAVA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NOS. 575 & 576 OF 2019†

APRIL 9, 2021

Section 14, read with section 238, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Moratorium - Whether after attachment when matter goes before Adjudicating Authority under PMLA, proceeding before Adjudicating Authority for confirmation would be civil in nature, that being so, section 14 would be attracted and applies - Held, yes - Whether section 14 will hit institution and continuation of proceedings before Adjudicating Authority under PMLA - Held, yes - Whether even if Authority under PMLA issues order of provisional attachment, institution and continuation of proceedings before Adjudicating Authority for confirmation would be hit by section 14 - Held, yes - Whether if Authorities under PMLA on basis of attachment or seizure done or possession taken under said Act resist handing over properties of corporate debtor to IRP/RP/Liquidator consequence of which will be hindrance for them to keep corporate debtor a going concern till resolution takes place or liquidation proceedings are completed, obstructions will have to be removed - Held, yes - Whether there is no conflict between PMLA and IBC and even if a property has been attached in PMLA which is belonging to corporate debtor, if CIRP is initiated, property should become available to fulfil objects of IBC till a resolution takes place or sale of liquidation asset occurs in terms of section 32A - Held, yes (Paras 39, 40, 41 and 42)

CASE REVIEW

SERI Infrastructure Finance Ltd. v. *Sterling SEZ & Infrastructure Finance Ltd.* (2019) 105 taxmann.com 167 (NCLT - Mum.) (para 43) *affirmed.*

CASES REFERRED TO

Sterling Biotech Ltd. v. *Andhra Bank* (CP (IB) No. 490/MBH/2018) (para 4), *Embassy Property Developments (P.) Ltd.* v. *State of Karnataka* (2019) 112 taxmann.com 56/(2020) 157 SCL 445 (SC) (para 19), *Manish Kumar* v. *Union of India* (2021) 123 taxmann.com 343 (SC) (para 21), *Dy. Director, Directorate of Enforcement Delhi* v. *Axis Bank* (2019) 104 taxmann.com 49 (Delhi) (para 25), *Varrsana Ispat Ltd.* v. *Dy. Director, Directorate of Enforcement* (2019) 108 taxmann.com 96/155 SCL 48 (NCL - AT) (para 25), *Varrsana Ispat Ltd.*

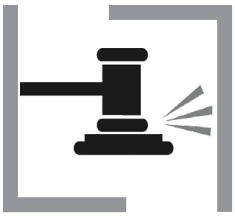
v. *Dy. Director, Directorate of Enforcement* (Civil Appeal No. 5546 of 2019, dated 22-7-2019) (para 25), *Pareena Swarup* v. *Union of India* (2008) 14 SCC 107 (para 35) and *P. Mohanraj* v. *Shah Brothers Ispat (P.) Ltd.* (2021) 125 taxmann.com 39 (para 40).

Zoheb Hossain, Special Counsel for ED, **Nitesh Rana** (SPP), **Ali Khan**, **Agni Sen**, Advs. and **Aslam Khan**, Deputy Director for ED *for the Appellant*. **Abhijeet Sinha**, **Rajendra Beniwal**, **Kumar Sumit**, **Chirag Gupta**, **Arijit Mazumdar**, **Shambo Nandy**, Advs. and **Manoj Kumar Agarwal**, RP *for the Respondent*.

† Arising from SREI Infrastructure Finance Ltd. *v.* Sterling SEZ & Infrastructure Finance Ltd. (2019) 105 taxmann.com 167 (NCLT - Mum.)

For Full Text of the Judgment see

(2021) 126 taxmann.com 210 (NCLAT - New Delhi)



(2021) 127 taxmann.com 877 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Mazda Agencies (Partnership Firm) v. Hemant Plastics & Chemicals Ltd.

JARAT KUMAR JAIN, JUDICIAL MEMBER AND KANTHI NARAHARI, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 763 OF 2020†

MARCH 5, 2021

Section 238A, read with section 9 of the Insolvency and Bankruptcy Code, 2016 and section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) - Corporate insolvency resolution process - Limitation period - Appellant operational creditor supplied printing and packaging material to respondent corporate debtor - Corporate debtor had acknowledged outstanding dues, however, failed to make payment - Due to financial crunch, corporate debtor was referred to BIFR, however formulation of approved scheme of rehabilitation did not work out - Subsequently, Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) was repealed on 1-12-2016 - Thereafter, operational creditor filed an application under section 9 of IBC - Adjudicating Authority held that application under section 9 of IBC was barred by Limitation - Appellant submitted that reference under SICA was made in 2005 and rehabilitation scheme had been sanctioned by erstwhile BIFR on 17-7-2013 but scheme could not be implemented till 2017; therefore, till 2017 remedy for enforcement of right to recovery was suspended under section 22(1) of SICA, hence, as per provision of section 22(5) of SICA, it would be entitled to get exclusion for aforesaid period in computing period of limitation - However, it was found that after formulation of a rehabilitation scheme under erstwhile SICA, appellant had sought permission from BIFR to approach Civil Court for adjudication of its dues - Thus, he was not part of scheme - Whether therefore, it could not be said that legal right of remedy of appellant against respondent was suspended as per section 22(1) of SICA - Whether thus, appellant would not be entitled to claim exclusion of time spent by it in SICA proceedings while computing limitation period - Held, yes (Paras 20, 22 and 24)

CASE REVIEW

Mazda Agencies (Partnership Firm) v. Hemant Plastic & Chemicals Ltd. (2021) 127 taxmann.com 876 (NCLT - Ahd.) (para 24) *affirmed* (***See Annex***).

Gouri Prasad Goenka v. Punjab National Bank (2020) 119 taxmann.com 452/162 SCL 462 (NCL-AT) (para 23) *distinguished.*

CASES REFERRED TO

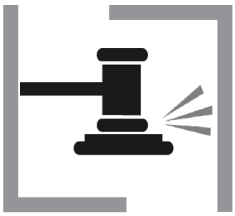
Mazda Agencies (*Partnership Firm*) v. *Hemant Plastic & Chemicals Ltd.* (C.P. (IB) No. 189/9/NCLT/AHM/2017, dated 7-7-2020) (para 1), *Gouri Prasad Goenka* v. *Punjab National Bank* (2020) 119 taxmann.com 452/162 SCL 462 (NCLAT - New Delhi) (Para 6) and *Zenith Ltd.* v. *Grand Foundry Ltd.* (2018) 92 taxmann.com 342/147 SCL 440 (Bom.) (para 7).

M.S.V. Sankar, **Sriram P.**, **A.G. Nair** and **Pawan S. Godiawala**, Advs. *for the Appellant.*

† Arising out of order passed by NCLT, Ahmedabad Bench in Mazda Agencies (Partnership firm) *v.* Hemant Plastic & Chemicals Ltd. (2021) 127 taxmann.com 876.

For Full Text of the Judgment see

(2021) 127 taxmann.com 877 (NCLAT - New Delhi)



(2021) 127 taxmann.com 871 (NCLAT - Chennai)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, CHENNAI

Pradeep Kumar Sekar v. Solar Semiconductor Energy Systems (India) (P.) Ltd.

VENUGOPAL M., JUDICIAL MEMBER AND V.P. SINGH, TECHNICAL MEMBER

COMPANY APPEAL (AT)(CH)(INS.) NO. 02/2021†

APRIL 19, 2021

Section 5(8), read with sections 3(12) and 7 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Financial debt - Corporate debtor had entered into a Lease Agreement with financial creditor for availing Lease Finance Assistance in respect of furniture and fixtures for its business purposes - On default being committed by corporate debtor, financial creditor issued demand notice and later filed application under section 7 which was admitted by Adjudicating Authority - Appellant, suspended director of corporate debtor, submitted that disbursal of amounts to corporate debtor was against supply of assets and against usage of assets (furniture & fixture) and not against time value for money and that primary ingredients of section 5(8) were not satisfied - However, it was found that 'Time Value' is price associated with length of time that an investor must wait until investment matures or related income is earned - In instant case financial creditor had invested a sum under 'Lease Agreement', in and by which a repayment schedule was mentioned as lease rental for a period of 36 months and at end of lease, asset was to be purchased by corporate debtor at a value which was received by financial creditor as security deposit - Whether therefore, it was an inevitable conclusion that disbursal of amounts to corporate debtor came within requirement of time value for money - Held, yes - Whether therefore, lease in instant case was a financial lease and there was financial debt as per section 5(8) and default being committed by corporate debtor in terms of ingredients of section 3(12), Adjudicating Authority had rightly admitted application under section 7 filed by financial creditor - Held, yes (Paras 53 and 58)

CASE REVIEW

Orix Leasing and Financial Services India Ltd. v. *Solar Semiconductor Energy Systems (India) (P.) Ltd.* (2021) 127 taxmann.com 870 (NCLT - Hyd.) (para 58) *affirmed* (***See Annex***).

CASES REFERRED TO

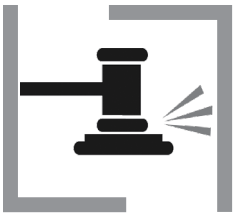
Phoenix ARC (P.) Ltd. v. *Ketulbhai Ramubhai Patel* (2021) 124 taxmann.com 90/164 SCL 468 (SC) (para 10.1), *Union of India* v. *Ibrahim Uddin* (2012) 8 SCC 148 (para 13), *Pioneer Urban Land & Infrastructure Ltd.* v. *Union of India* (2019) 108 taxmann.

com 147/155 SCL 622 (SC) (para 18), *Sabari Inn (P.) Ltd.* v. *Ramesh Associates (P.) Ltd.* (2017) 88 taxmann.com 70 (NCL - AT) (para 33) and *Uttam Galva Steels Ltd.* v. *DF Deutsche Forfait AG* (2017) 84 taxmann.com 183/143 SCL 318 (NCL-AT) (para 34).

V. Ramakrishnan, Sr. Counsel and **Vijayaraghavan SP**, Adv. *for the Appellant.* **Ms. Mano Ranjani** and **Y. Suryanarayana**, Advs. *for the Respondent.*

† Arising out of order passed by NCLT Hyderabad Bench in Orix Leasing and Financial Services India Ltd. *v.* Solar Semiconductor Energy Systems India (P.) Ltd. (2021) 127 taxmann.com 870.

For Full Text of the Judgment see
(2021) 127 taxmann.com 871 (NCLAT - Chennai)



(2021) 127 taxmann.com 867 (NCLAT - Chennai)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, CHENNAI

Renganayaki Agencies v. Sreenivasa Rao Ravinuthala

VENUGOPAL M., JUDICIAL MEMBER AND V.P. SINGH, TECHNICAL MEMBER

COMPANY APPEAL (AT) (CH) (INSOLVENCY) NO. 23 OF 2021†

APRIL 19, 2021

Section 31, read with section 30 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Resolution Professional compared Resolution Plans submitted by both K Group and CS - Resolution Plan submitted by both resolution applicants was almost equally placed except that K Group had scored in terms of faster payment of amount for resolving corporate debtor - Thus, though resolution plan of 'K Group' had been approved with 100 per cent voting in favour of it by CoC, Adjudicating Authority by impugned order held that in view of very meagre difference between both Resolution Plans there was scope for further improvement of resolution amount to be payable by resolution applicants - Accordingly, it directed CoC to take fresh bids from existing two resolution applicants and submit a fresh resolution plan for consideration - However, decision taken by CoC is a decision taken in accordance with its 'commercial wisdom', and hence, could not have been interfered with - Whether therefore, impugned order was to be set aside and Adjudicating Authority was to approve 'Resolution Plan' approved by CoC with 100 per cent voting in favour of 'K Group' - Held, yes (Para 19)

CASE REVIEW

Samyu Glass (P.) Ltd. , In re (2021) 127 taxmann.com 866 (NCLT - Hyd.) (para 19) *set aside* (***See Annex***).

Kalpraj Dharamshi v. Kotak Investment Advisors Ltd. (2021) 125 taxmann.com 194 (SC) (para 19) *followed.*

CASES REFERRED TO

Sreenivasa Rao Ravinuthala, In re (IA No. 1094 of 2020, dated 24-2-2021) (para 1), *Shrawan Kumar Agrawal Consortium v. Rituraj Steel (P.) Ltd.* (2020) 117 taxmann.com 302/160 SCL 210 (NCLAT - New Delhi) (para 10), *K. Sashidhar v. Indian Overseas Bank* (2019) 102 taxmann.com 139/152 SCL 312 (SC) (para 15) and *Kalpraj Dharamshi v. Kotak Investment Advisors Ltd.* (2021) 125 taxmann.com 194 (SC) (para 18).

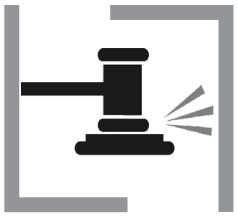
R. Vidhya Shankar, Adv. *for the Appellant.*

Aneesh V., Adv. *for the Respondent.*

† Arising out of order passed by NCLT Bench-I Hyderabad in Samyu Glass (P.) Ltd. *In re* (2021) 127 taxmann.com 866 (NCLT - Hyd.)

For Full Text of the Judgment see

(2021) 127 taxmann.com 867 (NCLAT - Chennai)



(2021) 127 taxmann.com 869 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Sunil Kewalramani v. Kestrel Import & Export (P.) Ltd.

JUSTICE A.I.S. CHEEMA, OFFICIATING CHAIRPERSON AND

V.P. SINGH, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NOS. 847, 848, 853, 1016, 1018 & 1019 OF 2020†

APRIL 19, 2021

Section 5(8), read with section 7 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Financial debt - Corporate debtor was a family owned company - Appellant was promoter, director and shareholder of company - Appellant had advanced loan on various dates to corporate debtor, out of which an amount was due to appellant by corporate debtor which corporate debtor had failed to pay - Hence, appellant filed petition under section 7, seeking to initiate Corporate Insolvency Resolution Process (CIRP) against corporate debtor - Corporate Debtor, however, submitted that contribution, made by appellant, was in form of share capital like other Directors and shareholders and amount was invested as quasi capital in company and there was no debt which was due and payable in terms of section 5(8) and, therefore, there was no default - Accordingly, adjudicating authority dismissed petition holding that proceedings had been initiated by appellant fraudulently and falsely and not for resolution of Insolvency - However, there was nothing on record to show that proceedings under section 7 were initiated for purpose other than seeking a resolution and appellants had initiated proceedings under section 7 in their capacity as financial creditors - Petition had been dismissed mainly because alleged debt could not be treated as financial debt - Furthermore, there was nothing on record to show that proceedings under section 7 initiated by appellant contained false particulars - Whether therefore, Adjudicating Authority could not have rejected application making invalid observations that appellant initiated proceedings fraudulently and falsely, not for resolution of insolvency - Held, yes - Whether therefore, appeal was to be allowed and remarks/observation made by Adjudicating Authority in impugned order were to be expunged - Held, yes (Paras 24 to 30)

CASE REVIEW

Sunil Parmanand Kewalramani v. *Kestrel Import & Export Pvt. Ltd.* (2021) 127 taxmann.com 868 (NCLT - Mum.) (para 30) *Set aside* (**See Annex**).

CASES REFERRED TO

Rupchand Gupta v. *Raghuvanshi (P.) Ltd.* AIR 1964 SC 1889 (para 13).

Pratik Tripathi, PCS and **Rahul Chitnis**, Advs. *for the Appellant.* **Dushyant Manocha**, **Ms. Ragini Gupta** and **Ms. Anannya Ghosh**, Advs. *for the Respondent.*

† Arising out of order passed by NCLT Mumbai Bench; in Sunil Parmanand Kewalramani *v.* Kestrel Import & Export (P.) Ltd. (2021) 127 taxmann.com 868.

For Full Text of the Judgment see
(2021) 127 taxmann.com 869 (NCLAT - New Delhi)

Code and Conduct of Insolvency Professionals Gift and hospitality

An Insolvency Professional forms vital pillar upon which rests the effective, timely functioning as well as credibility of the entire insolvency and bankruptcy resolution process. The role of Insolvency Professional encompasses a wide range of functions, which includes identification of the assets and liabilities of the Corporate Debtor, management of the affairs of the Corporate Debtor, custody of the assets of the corporate debtor, acceptance and verifications of claims of creditors, constitution and holding meetings of the committee of creditors, appointment of Professionals, invitation of prospective resolution applicants, submission of resolution plan approved by committee of creditors to adjudicating authority for its approval, disposal of assets etc. While performing his functions by the Insolvency Professional, there may be circumstances where gift or hospitality may be offered to him, any of his relative or any member of his team with the intent to influence his behaviour. This can range from minor acts of hospitality, to acts that result in non-compliance with laws and regulations. For instance, gift or hospitality may be offered by the Corporate Debtor in order to influence the functioning

of the Insolvency Professional, creditor whose claim is pending for verification by the Insolvency Professional, resolution applicant for consideration of its resolution plan etc. An Insolvency Professional, his team members or his relatives must not accept such gift or hospitality as this can cause serious threats to compliance with the other clauses of code of conduct of Insolvency Professionals such as Integrity, objectivity, Independence and impartiality. Further, an Insolvency Professional must not offer gift or hospitality to government officials or others in order to take any undue advantage.

Code and Conduct

With reference to "Gift and hospitality", the Code of Conduct specified in the First Schedule to Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 provides that:

- An insolvency professional, or his relative must not accept gifts or hospitality which undermines or affects his independence as an insolvency professional;
- An insolvency professional shall not offer gifts or hospitality or a financial or any other advantage to a public servant or any other person, intending to obtain or retain work for himself, or to obtain or retain an advantage in the conduct of profession for himself.

Practises in UK

- An inducement can take many different forms, for example: gifts, hospitality, entertainment, political or charitable donations, appeals to friendship and loyalty, employment or other commercial opportunities, preferential treatment, rights or privileges etc.
- Insolvency practitioners are required to comply with the fundamental principles and apply the conceptual framework to identify, evaluate and address threats.
- In relation to an insolvency appointment, offering or accepting inducements might create a self-interest, familiarity or intimidation threat to compliance with the fundamental principles, particularly the principles of integrity, objectivity and professional behaviour.
- *Inducements Prohibited by Laws and Regulations:* In many jurisdictions, there are laws and regulations, such as those related to bribery and corruption, that prohibit the offering or accepting of inducements in certain circumstances. The insolvency practitioner shall obtain an understanding of relevant laws and regulations and comply with them when the insolvency practitioner encounters such circumstances.
- *Inducements Not Prohibited by Laws and Regulations:* The offering or accepting of inducements that is not prohibited by laws and regulations might still create threats to compliance with the fundamental principles.

- *Inducements with Intent to Improperly Influence Behaviour:* An insolvency practitioner shall not offer, or encourage others to offer, any inducement that is made, or which the insolvency practitioner considers a reasonable and informed third party would be likely to conclude is made, with the intent to improperly influence the behaviour of the recipient or of another. An insolvency practitioner shall not accept, or encourage others to accept, any inducement that the insolvency practitioner concludes is made, or considers a reasonable and informed third party would be likely to conclude is made, with the intent to improperly influence the behaviour of the recipient or of another.

- If an insolvency practitioner encounters a situation in which no or no reasonable action can be taken to reduce a threat arising from offers of gifts or hospitality to an acceptable level the insolvency practitioner shall conclude that it is not appropriate to accept the offer.

- An insolvency practitioner shall not offer or provide gifts or hospitality where this would give rise to an unacceptable threat to compliance with the fundamental principles.

- *Inducement by or to Immediate or Close Family Members:* An insolvency practitioner shall remain alert to potential threats to the insolvency practitioner's compliance with the fundamental principles created by the offering of an inducement by or to an immediate or close family member of the insolvency practitioner. Where the insolvency practitioner becomes aware of an inducement being offered to or made by an immediate or close family member and concludes there is intent to improperly influence behaviour, or considers a reasonable and informed third party would be likely to conclude such intent exists, the insolvency practitioner shall advise the immediate or close family member not to offer or accept the inducement.

Practises in United States

Solicitation of Gratuities, Gifts, or other Remuneration or thing of value

Neither a trustee nor any of the trustee's employees may solicit or accept any gratuity, gift, or other remuneration or thing of value from any person, if it is intended or offered to influence the official actions of the trustee in the performance of the trustee's duties and responsibilities. The incidental receipt of unsolicited advertising and promotional material of a nominal intrinsic value, along with the receipt of food and refreshments in the ordinary course of a business meeting, generally would not create an impermissible conflict or an appearance thereof.

References

- Handbook on ethics for Insolvency Professionals by IBBI

- Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016
- Insolvency Code of Ethics, UK
- Handbook for Chapter 7 Trustees available at https://www.justice.gov/ust/file/handbook_for_chapter_7_trustees.pdf/download

●●●

FAQs on Applications to be made to the Adjudicating Authority as per the Code and its Regulations by Resolution Professional

1. Who shall make application under sections 7, 9 and 10 of the Code?

Financial Creditor shall make an application under section 7 for initiation of CIRP.

Operational Creditor shall make an application under section 9 for initiation of CIRP.

The Corporate Applicant shall make application under section 10 for initiation of CIRP.

2. Who shall file application for extension of CIRP period beyond 180 days?

As per Section 12(2) of the Code read with Regulation 40(1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 a Resolution Professional shall file an application for extension of CIRP period beyond 180 days as approved by 66 per cent of the CoC.

3. Who shall file application for withdrawal of CIRP proceedings?

As per section 12A of the Code read with Regulation 30A(4) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 Applicant (FC/OC/ Corporate Applicant) or Resolution Professional (on behalf of Applicant) shall

file application for withdrawal of CIRP proceedings with 90 per cent CoC approval.

4. Who shall file application u/s 19(2) of the code?

Interim Resolution Professional if not given assistance/co-operation from the Corporate Debtor, their personnel or any other person can file application u/s of the code.

5. Which application is filed u/s 21(6A)(*b*) of the Code ?

The interim resolution professional shall make an application to the Adjudicating Authority along with the list of all financial creditors, containing the name of an insolvency professional, other than the interim resolution professional, to act as their authorized representative who shall be appointed by the Adjudicating Authority prior to the first meeting of the committee of creditors for class of creditors exceeding the specified number.

6. Under which section a Resolution Professional shall submit the Plan approved by CoC?

A Resolution Professional under section 30(6) of the Code read with regulation 39(4) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 shall submit the resolution plan as approved by the Committee of Creditors to the Adjudicating Authority.

7. Who shall intimate Adjudicating Authority about the decision of 66% CoC to liquidate the Corporate Debtor?

Resolution Professional u/s 33(2) of the Code intimate Adjudicating Authority of the decision of the Committee of Creditors to liquidate the corporate debtor.

8. Who shall file List of Creditors after Verification of Claims?

As per regulation 13(*d*) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the interim resolution professional or the resolution professional, as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims and file such list of creditors with the Adjudicating Authority.

9. When shall report certifying constitution of the committee shall be filed?

As per regulation 17(1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the interim resolution professional shall file a report certifying constitution of the committee to the Adjudicating Authority within two days of the verification of claims received.

10. Who shall apply for avoidance of preferential transaction under the code?

As per sec. 43(1) of the Code a Resolution Professional/Liquidator shall apply to the

Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in section 44.

11. Which application is filed under section 50 of the Code?

If the corporate debtor has been a party to an extortionate credit transaction involving the receipt of financial or operational debt during the period within two years preceding the insolvency commencement date, the liquidator or the resolution professional as the case may be, may make an application for avoidance of such transaction to the Adjudicating Authority if the terms of such transaction required exorbitant payments to be made by the corporate debtor.

12. Who shall file application for avoidance of undervalued transactions?

As per section 45 of the Code if the liquidator or the resolution professional, as the case may be, on an examination of the transactions of the corporate debtor determines transactions that are undervalued he shall make an application to the Adjudicating Authority to declare such transactions as void and reverse the effect of such transaction.

13. Which application is filed under section 66 of the Code?

If during the corporate insolvency resolution process or a liquidation process, it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose, Resolution Professional shall make an application to the Adjudicating Authority. Adjudicating Authority may on the application of the resolution professional pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit.

14. Under which section a Resolution Professional shall give consent to act as a Liquidator?

As per section 34(1) of the Code, Where the Adjudicating Authority passes an order for liquidation of the corporate debtor under section 33, the resolution professional appointed for the corporate insolvency resolution process under Chapter II or for the pre-packaged insolvency resolution process under Chapter III-A shall, subject to submission of a written consent by the resolution professional to the Adjudicatory Authority in specified form, shall act as the liquidator.

Policy updates (April, 2021)

1. Central Government notifies Insolvency and Bankruptcy (Pre-packaged insolvency resolution process) Rules, 2021 *vide* notification dt. 9th April, 2021.

2. *Vide* its notification dt. 9th April 2021, MCA notifies 10 lakh INR as the minimum amount of default for matters relating to Pre-packaged insolvency resolution process of Corporate Debtor under Chapter III-A, IBC.

3. IBBI notifies the Insolvency and Bankruptcy Board of India (Pre-packaged Insolvency Resolution Process) Regulations, 2021 *vide* its notification dt. 9th April 2021.

4. IBBI notifies (*vide* its notification dt. 13th April 2021) the Insolvency and Bankruptcy Board of India (Information Utilities) (Amendment) Regulations, 2021.

5. IBBI notifies (*vide* its notification dt. 27th April 2021) the Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) (Second Amendment) Regulations, 2021.

Insolvency in Uzbekistan

The main document regulating insolvency regime in Uzbekistan is the Law "*On Bankruptcy*" adopted in May 5, 1994 (the "Bankruptcy Law"). Adoption of the Bankruptcy Law was aimed at setting up a system of insolvency proceedings for legal entities as well as for individual entrepreneurs. Being a former-Soviet country Uzbekistan at that time had close to none historical background of bankruptcy regulations whatsoever. Unsurprisingly this first version of the Bankruptcy Law had failed to work successfully in practice as it did not cover many vital issues that kept arising thought attempts of implementing the bankruptcy proceedings. There were actually only two cases brought to court during the four-year period of existence of this version.

The evident under development of the first version of the Bankruptcy Law led to adoption of the second one on August 28, 1998. Compared to the previous one, the updated version expanded the scope of creditors' rights and also attempted to fill in the procedural gaps of the previous insolvency regime. This resulted in apparent progress of Uzbek bankruptcy law: 439 bankruptcy cases were adjudicated in 1998 alone.

Salient features of Bankruptcy Law:

Basis of Comparison	India	Uzbekistan
Laws governing Insolvency	Insolvency and Bankruptcy Code, 2016 (IBC)	Law of The Republic of Uzbekistan on Bankruptcy
Cross Border Insolvency	Sections 234 and 235 of IBC contain details of cross border insolvency in India. It gives power to the that the Central Government can make any agreements with the foreign country to start with the insolvency proceedings	Recognizes international and foreign agreements
Adjudicating Authority	National Company Law Tribunal (NCLT) is the Adjudicating Authority. The Appellate Authority is National Company Law Appellate Tribunal (NCLAT).	The hearing and the appeals for such insolvency cases happen in the economic courts especially assigned for this purpose
Types	There is Corporate Insolvency, Voluntary Liquidation and Liquidation which includes schemes of arrangement.	There is supervision, sanation, external management, amicable agreement and liquidation procedure.
Moratorium	Moratorium is imposed on all the proceedings other than insolvency and all the other agreements of the company as soon as Insolvency Application is admitted by the court. It continues either till a resolution plan is implemented or till the company is liquidated.	It is suspension of fulfilment of pecuniary obligations by the debtor and settlement of compulsory payments
Who can trigger	Under IBC, the debtor themselves, the creditors (financial or operational) can trigger insolvency	A debtor, a creditor, a prosecutor, a tax agency or other State authority.
Control	The control of the assets and management of the Corporate Debtor rests with the Insolvency Professional/Liquidator appointed by the Court, once proceedings start.	The control of the assets and management stays with the Debtor even after insolvency is initiated against them.

Basis of Comparison	India	Uzbekistan
Role of Insolvency Professional	Under IBC, the Insolvency Professional is known as a officer of the court and plays the role of taking over the Corporate Debtor, keeping it as a going concern, managing claims, holding creditor meetings, preparing the Information Memorandum etc. On company undergoing liquidation, the IP has to hand over the company to the Liquidator.	The economic court appoints an external manager or an authorized agent to take over the external management of the debtor or liquidation proceedings respectively.
Decision Making	Points for decision taking are put to vote in the Committee of Creditors. The insolvency professional cannot take decisions on his own.	Points for decision taking are put to vote in the Committee of Creditors. The external manager or the authorized representative cannot take decisions on his own.
Fees	The fees of Insolvency Professional is decided and ratified by the Committee of Creditors and forms part of the CIRP cost.	The fees of external manager and authorized representative also is decided in the creditor committee and is paid out of debtor's property
Priority of creditors	Section 53 of IBC lays done the priority of payment in cases of liquidation: (*a*) The insolvency resolution process costs and the liquidation costs paid in full; (*b*) the following debts which shall rank equally between and among the following :— (*i*) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and	Article 83 of the Law on Bankruptcy talks of the sequence of satisfaction of the creditors demands secured by pledge: ◆ Out of turn payments: legal costs, the remuneration of the court manager, current utility and maintenance payments, expenses for insurance of the debtor's property, payments related to debtor's obligations that arose after introduction of bankruptcy procedure, payments to the individuals to whom the debtor bears responsibility for causing harm to life or health;

Basis of Comparison	India	Uzbekistan
	(*ii*) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52; (*c*) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date; (*d*) financial debts owed to unsecured creditors; (*e*) the following dues shall rank equally between and among the following:— (*i*) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date; (*ii*) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest; (*f*) any remaining debts and dues; (*g*) preference shareholders, if any; and	◆ claims (certified by payment (executive) documents) on the issuance of wages, recovery of alimony and payment of remuneration under copyright agreements; ◆ claims regarding mandatory obligations, compulsory insurance, bank loans and bank credit insurance, as well as claims of creditors secured by collateral in part of the debt which was not covered due to insufficient amount received from the sale of pledged property (subject of pledge) and claims not secured by collateral; ◆ claims of shareholders on the accrued dividends; ◆ other claims The payments under one category of claims can only be made once all payments of previous category were satisfied.

Basis of Comparison	India	Uzbekistan
	(*h*) equity shareholders or partners, as the case may be	
Provisions for avoidance transactions	Yes	Article 132 of Law on Bankruptcy talks of unlawful actions that lead to Bankruptcy and this includes avoidance transactions as well.
Approval for Reorganization Plan	Creditor Approval needed	Creditor Approval needed
Regulations for Group Insolvency of Companies	No specific provisions	No Specific provisions
Dealing with COVID-19	Increasing the threshold for triggering insolvency as well as prohibiting legal proceedings for non-payment during this pandemic.	On April 3, 2020, Uzbekistan released PD-5978 on additional measures to support the population, economic sectors, and business entities during the coronavirus pandemic. The decree provides for measures to ensure the stable functioning of economic sectors, as well as providing support to individual economic entities. For example, for a number of goods the customs duty and excise tax rates were removed until 31 December 2020; additional tax optimization for certain taxpayers; a moratorium on initiating bankruptcy procedures and declaring enterprises bankrupt has been introduced until 1 October 2020; accrual and collection of rental payments for the use of state property has been suspended, etc.

- As per Article 3 of the Bankruptcy Law, the terms "bankruptcy" and "insolvency" are used interchangeably and are defined as debtor's incapacity to satisfy its monetary obligations or mandatory payment obligations.
- A company can restructure its debts in an effort to restore solvency. This is regulated by Uzbek insolvency laws, but takes place outside the bankruptcy proceedings. The restructuring of debts can be carried out with the assistance of the debtor's shareholders, either with the shareholders' financial aid, provision of a loan or a guarantee. A restructuring can be carried out by agreement between creditors or other parties and the debtor. The restructuring does not affect the right of the creditors to enforce their loans and security.

The amended law on bankruptcy includes classification of creditors, strengthened the requirements for court receivers and curtailed the periods of each bankruptcy proceeding. Nevertheless, there was a lot left to be desired in terms of procedural matters, application of the bankruptcy test and intricacies regarding certain categories of debtors. Moreover, certain loopholes such as the recognition in Uzbekistan of foreign court decisions in bankruptcy proceedings have not been addressed completely. The law does not impose a strict timeline for the completion of insolvency proceedings

As per *Doing Business Report*, Uzbekistan is at rank 100 in "*resolving insolvencies*".

The score is based on various parameters *w.r.t.* `*Ease of Doing Business*' which are as follows:

Economy	*Resolving Insolvency Score*	*Recovery rate (cents on the dollar)*	*Time (years)*	*Cost (% of estate)*	*Outcome (0 as piecemeal sale and 1 as going concern)*	*Strength of insolvency framework index (0-16)*
Uzbekistan	100	34.4	2.0	10.0	0	8.0

Uzbekistan has the potential to become one of the strongest economies in the post-Soviet area. Uzbekistan has demonstrated stable economic development in recent years, reporting 5.6% GDP growth in 2019. The country's leadership continues to implement large-scale economic reform policies targeted at boosting growth through modernization of state-owned monopolies and creating a supportive climate for private and foreign direct investment.

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